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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

v. 20 Cr. 497 (GHW)

DANIEL WALCHLI,

Defendant.

Oral Argument
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New York, N.Y.
January 5, 2023
2:30 p.m.

Before:

HON. GREGORY H. WOODS,

District Judge

APPEARANCES

DAMIAN WILLIAMS
United States Attorney for the
Southern District of New York
BY: NANETTE L. DAVIS
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Attorneys for Defendant Daniel Walchli
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RICHARD F. ALBERT
JOSHUA P. BUSSEN
DANIEL P. GORDON

Also Present: Special Agent Zachary Katz, IRS

(Case called)

MS. DAVIS: Good afternoon, your Honor.

Nanette Davis of the Department of Justice Tax Division for the government, along with AUSA Olga Zverovich, Tax Division trial attorney Chris Magnani, and IRS Special Agent Zachary Katz.

THE COURT: Good. Thank you very much. Good afternoon.

MR. TEMKIN: Good afternoon, your Honor.

Jeremy Temkin, Morvillo, Abramowitz, Grand, Iason & Anello, for Mr. Walchli. Mr. Walchli is with us today, as are my partner Rich Albert, and our colleagues Joshua Bussen and Daniel Gordon.

THE COURT: Very good. Thank you very much. Good afternoon.

Counsel, I scheduled this conference in large part to take up the motion to dismiss that was filed by the defendant in this case, so I hope to do that. Counsel, I've reviewed the parties' submission in connection with that motion. I'm happy to give the parties the opportunity to add anything to your written submissions if you'd like to do so. But I have, as I said, reviewed the written submissions that have been provided to me in detail. Before I move to that, let me ask if there's anything else that either party would like to raise to the Court's attention at this conference starting with counsel for

the government. Counsel.

MS. DAVIS: Other than the scheduling matters that are incorporated into the motion to dismiss, we have nothing further.

THE COURT: Thank you. Counsel for defendant.

MR. TEMKIN: Your Honor, we've been going back and forth with the government over some discovery issues that we think we are resolving without the court's intervention. So at this time, we don't have anything to raise with your Honor.

THE COURT: Good. Thank you very much. Thank you for working together to resolve any such issues. Please let me know if there's anything that I can help you with.

So, counsel, as I said, I've read the written submissions by the parties in connection with the motion. Is there anything that either side would like to add or add to or amplify from your written submissions, beginning first with counsel for defendant. Counsel.

MR. TEMKIN: Your Honor, we have three motions essentially. First motion to dismiss is based on the statute of limitations, which I was planning to address with your Honor.

The second issue is the extraterritoriality of *Klein*, which Mr. Albert was going to address, and then the third deals with the pretrial disclosures issues. So if your Honor doesn't mind taking them in that order, I would address the first and

the third, and Mr. Albert the second.

THE COURT: Thank you. I'm happy to hear from you. Please go ahead.

MR. TEMKIN: Thank you, your Honor.

So, your Honor -- and I know that you've reviewed the papers, so you know that for purposes of this motion, we acknowledge that the statute -- that the indictment was timely on its face. The optimal date for the statute of limitations was April 16, 2021, and the government met that by filing the indictment in September of 2020. However, the government filed the indictment under seal. And when the government does that, it is not entitled to the benefit of tolling, unless it can establish first that the initial decision to seal the indictment was informed by sound prosecutorial discretion. And second, that the indictment -- that any delay in unsealing the indictment serve some legitimate prosecutorial need.

We do not dispute that the initial decision to file under seal was reasonable, but we do argue and believe that the government did not have a legitimate basis to continue to keep the indictment under seal, either after October 15 when we contacted the government and offered to bring Mr. Walchli to the United States to face any charges that may have been brought; or certainly after Mr. Lampert was arrested in a country from which he could and ultimately was not extradited.

I don't think the government disputes that once we

contacted them and offered for Mr. Walchli to come to the United States that it could not keep the indictment sealed as to him. I do think that they suggest that our offer was somehow unreliable. And quite frankly, I don't understand that argument.

Mr. Walchli is a businessman. He is a respected businessman. He has no prior record. He's charged with a single conspiracy count. He offered to come to the United States from Switzerland, a country from which he never could have been extradited if he had chosen to take that course as some of his co-defendants have. So our request that he be afforded a reasonable bail package upon surrendering was not a big ask. It wasn't a heavy lift for the government to come to an agreement on bail. In fact, at no time prior to the unsealing of the indictment did the government even ask what we thought a reasonable bail package would entail. And there's no suggestion that our discussions regarding the reasonable bail package at any time implied that Mr. Walchli would not come or that there was any sort of line in the sand drawn.

THE COURT: Let me just ask about that, counsel. There was a negotiation. Is that right?

MR. TEMKIN: Your Honor, there was -- a negotiation is no different than negotiations that happen every single case with a white collar defendant. The government asked for financials. We provided them with financials. The government

asked for certain conditions relating to what would happen in the event that there was another lockdown, whether Mr. Walchli would have to come here in the event of a lockdown and sort of sit out any lockdown in the United States, or whether he could remain in Switzerland pending the resolution of a lockdown.

THE COURT: Let me just put it more bluntly. Would the defense have necessarily accepted any set of conditions proposed by the United States?

MR. TEMKIN: Any reasonable set of conditions, yes. In a white collar case in which the defendant has no prior record, is voluntarily coming to face the charges, I think that the package that we ultimately agreed upon was a reasonable package. And there were no -- the only condition that was at any time in question was whether Mr. Walchli would have to sit here -- excuse the vernacular, cool his jets in the event of another lockdown. That was the only issue that caused any sort of -- was a negotiated point.

And your Honor can see that we reached an agreement. We reached an agreement relatively promptly, and Mr. Walchli is of course here. And in no point your Honor did we suggest that, well, if you don't agree to this, he's not going to come. That was never an issue. So if the government had demanded a $50 million bond or had made unreasonable requests, we may not have been able to reach an agreement. But if we hadn't reached an agreement, we would have come to your Honor to pursue an

agreement.

And as I noted, your Honor, from October 15 of 2020, when we made the initial offer, to October 5 of 2021, so 355 days, the government never asked us what conditions we were thinking of. And they could have done that without, in any respect, disclosing that there was in fact an indictment if that was their concern. So if they thought that this was somehow not a genuine offer, they could have explored that, but they never did.

So, your Honor, the government argues that it was entitled to keep the indictment sealed for a year after Mr. Walchli's offer to come based on its purported desire to arrest other defendants. In this regard, it relies on the *Muse* case and the *Davis* case. The *Muse* case was the Second Circuit case, and *Davis* I believe was Judge Haight.

And unlike *Muse* and *Davis*, here all of the defendants -- and I think this is fairly undisputed. This was not a covert investigation. This was not some sort of secret concealed investigation. Everyone knew that the government was looking at the conduct that ultimately led to the indictment. The conduct was first disclosed by Private Bank IHAG in connection with its participation in the Swiss bank program. It was publicly disclosed in the non-prosecution agreement that the bank entered into with the department of justice. It is posted on the DOJ's website, and it was posted on the website

from 2015 forward. Between June of 2014 and September of 2020, the government had numerous contacts with lawyers for the bank, lawyers for witnesses, actually met with a number of witnesses, including one of the defendants. And perhaps most important in terms of disclosure of the investigation, in the summer of 2017, the government filed requests for legal assistance with the Swiss authorities.

And the significance of that, your Honor, is that under the procedures and law governing such requests, the defendants or the targets of the requests all receive notice. So six of the seven individuals who were named in the indictment were notified that the U.S. government was in fact conducting an investigation, and was seeking evidence from the Swiss authorities relating to that investigation. So there was no secret. This was not a secret investigation. And so we because of that, this case falls more on the side of the *Gigante* case, which was Judge Chin's case, and then the *Rogers* case from Mississippi where the defendants were aware of the pendency of an investigation, and the courts found that the undermined the government's need to seal.

Now, we acknowledge that *Gigante* and Rogers were one defendant cases. But here, everyone of the defendants was aware. So this is not a situation where some defendants were aware and others were not. This is a case where everyone was knowledgeable that there was an investigation pending.

THE COURT: Is there evidence that the government was aware that the defendants were aware?

MR. TEMKIN: Well, your Honor, I know that at least as early as June of 2014, the department of justice tax division was aware that a number of the defendants were represented by counsel, including that I was representing Mr. Walchli. I believe that certainly the government was aware and would have been aware that by providing a request in legal assistance from the Swiss authorities, that that would trigger notice to the defendants of the pendency of the request for legal assistance. So based on the sort of pendency of the investigation --

THE COURT: Can I just ask a question. My understanding is from your submissions that you were not aware that the defendant had been indicted at the time that you reached out to the government. Are you telling me that's not the case?

MR. TEMKIN: Was not aware that there was an indictment pending. I was aware that there was an investigation. I was aware that there was an investigation starting in 2014, in connection with the Swiss bank program. But when we contacted the department of justice, we were not aware that an indictment had in fact been returned. We were aware that there had been certain steps taken in connection with the investigation that led us to be sort of focused on the possibility that there had been an indictment; hence the call

and hence the outreach. But we were not aware that an indictment had in fact been returned, let alone that it was under seal.

THE COURT: Can I just probe that just out of interest. Mr. Walchli's role was what it was at the institution. You were aware of the fact that there was an investigation or a *non pros* entered into with the institution. How many levels down from the top of a company are supposed to be aware that they are personally the target of a criminal investigation as a result of the fact that the corporation has entered into a *non pros*?

So how far down does this, I'll call it, constructive knowledge doctrine that you are promoting extend?

MR. TEMKIN: Certainly, your Honor. To the extent that the bank's counsel felt the need to identify -- to provide counsel to an individual, that would certainly trigger one level of knowledge. So by virtue of the fact that we were brought in and retained to represent Mr. Walchli, and the government knew that. So this is not a situation where you have some third, fourth tier employee who is represented by counsel, and the government is unaware of it.

The government's aware that we are representing Mr. Walchli. And moreover, in connection with the request for legal assistance, the government would be aware that Mr. Walchli was notified of that; and so therefore should have

been aware that he knew that there was an investigation pending. So it's not -- it's not constructive knowledge just in a vacuum, your Honor. It's constructive knowledge in the context of the government being told that this is an individual who is represented, and the government subsequently making a request of the Swiss authorities that causes the Swiss authorities to notify Mr. Walchli that there is a pending investigation.

THE COURT: Thank you. How does that argument extend to the other defendants named in the indictment?

MR. TEMKIN: Well, with respect to I believe all of the individuals in the indictment other than one, I believe it was Mr. Bechtiger, all of the remaining defendants were named in the Swiss treaty request, the request for legal assistance. I believe that the government was aware that Mr. Lampert, Mr. Ruegg, and Mr. Schnellman were all aware of the investigation. And Mr. Sage was also identified in the treaty request, so I believe that all but one of the defendants -- that would apply to all but one of the defendants.

THE COURT: Thank you. You can proceed.

MR. TEMKIN: So based on sort of their awareness of the investigation, defendants had an incentive not to travel outside of Switzerland if they were so inclined to do. Obviously everyone has a different risk tolerance. Everyone has a different willingness to come and face the charges.

Mr. Walchli obviously has made clear that he was willing to face the charges and is here doing so. But in our reply papers, we noted that there were press reports as early as 2012 in the Swiss press that people were -- bankers, executives were being cautioned not to travel outside of Switzerland. So the notion that this goes to whether the government reasonably could believe that people who were aware that they specifically were under investigation would travel outside of Switzerland and put themselves in a position where they could be arrested and extradited.

And so given the public nature of the investigation, given the notice that was provided to the defendants, and given just the general cautions against travel, we submit that it was not reasonable for the government to keep an indictment under seal in the face of a specific offer by one of the defendants to come to the United States to face the charges.

And when Mr. Lampert is arrested in February of 2021, that sort of, that calculus becomes even more remote. Now, we've gone back and forth with the government over who knew of Mr. Lampert's arrest, and when they knew it. But quite frankly, the government's position that there was no press surrounding the arrest of Mr. Lampert; and so, therefore, it had successfully kept that confidential. They had no way of knowing whether individuals in Switzerland were aware of it. They had no way of knowing whether Mr. Lampert contacted some

of his co-defendants and said, by the way, I was arrested. They could not have any assurances that that did not happen.

And so, as a matter of fact, as your Honor knows, as a matter of fact, we did know that. But whether we knew or we didn't know is almost irrelevant. The point is, is that the government in assessing whether it is reasonable to keep the indictment under seal at that point, whether they are making a prosecutorial -- exercising their prosecutorial discretion in saying, Wait, we can still capture other people. The question is, is whether they were justified in keeping the indictment under seal at that point.

And so we would ask that in assessing sort of the reasonableness of the government's delay in unsealing the indictment, and whether that served a legitimate prosecutorial purpose, we think that the Court should consider three things: First, the options that were available to the government. Second, what the government did in fact to effectuate the arrest of one of Mr. Walchli's co-defendants. And third, whether disclosing the information to Mr. Walchli or disclosing the fact that Mr. Walchli had been charged would have materially affected the government's ability to get other defendants.

With respect to the options that were available to the government -- there are really four that they had. One is, they could have unsealed the indictment in its entirety. I

note that they did that in other significant Swiss bank related cases. They did that in the *Paltzer* and *Buck* case that was tried in this district. They did that in the *Adami* case that was prosecuted in the Eastern District of Virginia, and they did that in the *Raoul Weil* case that was prosecuted in the Southern District of Florida. In each of those cases, the indictment was either never filed under seal or was unsealed within days of having been filed. And in none of those cases were the defendants present in the United States at the time. They were all, as far as I understand it, based in Switzerland and remained in Switzerland for some time until they subsequently came to the United States to face charges.

But there is no mandate that the government file such an indictment under seal. And, in fact, in high profile cases, they have done the opposite. They filed the indictment publicly, and they filed press releases related to that.

The second alternative that was available to the government would have been to at the time the indictments were returned to essentially obtain one overarching indictment, and then a separate indictment in which it charged each of the six defendants. That is actually a course that the government took in the Panama Papers case, *United States v. Ramses Owens*. And they also took that course in the *OneCoin* cryptocurrency prosecution in this district.

A third option that was available to the government

upon Mr. Walchli's offer to surrender and come to the United States would have been to do what it did with Mr. Lampert, quite frankly, with far less justification or reason with respect to Mr. Lampert. But they could have obtained a limited unsealing order, provided Mr. Albert and myself with a copy of the indictment subject to restrictions, and allowed us to start preparing a defense. But they could have notified us that there was in fact an indictment pending. That's that what they did with Mr. Lampert.

And as your Honor knows from our papers, Mr. Lampert's situation in February of 2021, is virtually identical to Mr. Walchli's situation in October of 2020, except for the fact that Mr. Walchli actually offered to come here. If the government really wanted to have a defendant to put on trial, Mr. Walchli was ready, willing, and able to do that, and they decided not to take him up on that offer. That was their decision, but they can't then say, but we're justified in keeping the indictment under seal.

Finally, the government could have, as it did with Mr. Chin, proceeded under seal in this case. Obviously at some point that becomes untenable, but we're now over two years after we initially reached out to the government to make the offer to come. And so at what point in that two-year period unsealing would have been necessary is unclear, but certainly there was no reason why it could not have at least in the

initial stages sealed the indictment, and again allowed us to begin litigating this case so that we're not two years down the road and just now arguing motions.

The government chose not to do any of those things. It chose basically to keep our offer that Mr. Walchli come to the United States to face the charges in its back pocket in the hopes that it might obtain some other defendant in the interim. That's a choice the government made. But having made that choice, it cannot now say they're justified in keeping the indictment under seal as Mr. Walchli. As to the others, they're not my problem. But Mr. Walchli, they have a different issue.

The next sort of point that I wanted to make was that when you look at what the government did with respect to obtaining the arrest of the different co-defendants. The only concrete step that the government identifies that it did, was it lodged the arrest warrants with Interpol. And interestingly, at the time that we called the government and made the offer, Interpol had not even published the warrants, and it did not do so for another three or so months after that. So I don't pretend to know all the steps the government took covertly to try to obtain the presence of other defendants, but certainly the only step they kept pointing to in this court is the filing of the Interpol notice.

And that, quite frankly, when you're dealing with

defendants who are in countries from which they cannot be extradited, and are aware that they are under investigation, it's not really doing a lot to try to actually get defendants into the country.

And that sort of goes to my next point which is, the government's decision to keep the indictment under seal was not based on some assessment of the likelihood that they would in fact be able to get someone, one of the other defendants, arrest them and extradite them. And, of course, your Honor's aware that extradition can frequently can be a years-long process. But it's not that there was some likelihood that that would happen, it was really hope and speculation that it might happen.

And again, in light of the public nature of the investigation, in light of the sort of press reports in Switzerland, there was just no basis to have that hope and speculation that, in fact, one of these defendants would come. Now, the government obviously points to the fact that they were able to arrest Mr. Lampert and Mr. Ruegg, and they argue that that justifies keeping the indictment under seal.

The first thing is, is that you have to assess the decision to keep the indictment under seal at the time that it was made, not with hindsight. So the government looks and says, looks with hindsight and says, Aha, we were able to arrest Lampert, and we were able to arrest Ruegg, and so

therefore that justifies our decision.

The question is, is whether at the time that they passed on our offer to bring Mr. Walchli to the United States, whether that was a reasonable judgment, and at that time obviously they had no way to know that they would be able to arrest Mr. Lampert and Mr. Ruegg.

Second, Mr. Lampert was, of course, arrested in a country from which he could not be extradited. And so the fact that he traveled outside of Switzerland to a country from which he could not be extradited does not support the government's conclusion that, in fact, that they were justified in keeping the indictment sealed.

Similarly, the fact that Mr. Ruegg left Switzerland in the summer of 2021, all that means is that he was prepared at that point to take the risk associated with traveling, notwithstanding an awareness that he was under investigation. Of course the government did not obtain his extradition to this day, two years after Mr. Walchli made the offer to come to the United States, over two years after that. He remains the only defendant who the government has actually in hand, is able to bring to this Court. And so the fact that Mr. Ruegg ventured outside of Switzerland would only help the government if in fact number one, they had reason to think he would in fact do that, not speculation or hope that he would get cabin fever from Covid; but rather a reason to believe that they would in

fact be able to get someone. And two, to be able to arrest someone doesn't mean anything if you can't extradite them.

So, your Honor, for all those reasons we think that the government was tardy in unsealing the indictment, that it's not entitled to the tolling after October 15 of 2020, or certainly February 1 of 2021. And without that tolling, the statute of limitations has expired, and the case should be dismissed, and in fact must be dismissed.

THE COURT: Good. Thank you. You can proceed, counsel.

MR. TEMKIN: Thank you, your Honor.

MR. ALBERT: Good afternoon, your Honor.

I'm going to address our arguments regarding extraterritoriality and the *Klein* doctrine. Your Honor, it's undisputed that all of the defendants actions alleged in the indictment took place outside the United States, every single meeting, communication, act by the defendants took place in Europe or Asia; yet the government is trying to convict Mr. Walchli and these other foreign defendants for their foreign actions under the broad defraud prong of 18 U.S.C. Section 371.

The indictment in this case cannot be squared with the Supreme Court's and the Second Circuit's modern extraterritoriality case law. Now, first the government argues incorrectly that this Court doesn't have to apply the two-step

framework of *RJR Nabisco* to resolve extraterritoriality in this case because it relies on *Bowman*.

But over the last 13 years, your Honor, the Supreme Court has reiterated on multiple occasions that the presumption against extraterritoriality applies to all federal statutes. And has, as one court has characterized it, has said that with increased clarity and emphasis in recent years. So in line with those holdings, the Second Circuit has applied the presumption against extraterritoriality and the two-step framework of *RJR* in both criminal and civil cases, criminal and civil statutes. The argument that *Bowman* creates a carve out for statutes that protect the U.S. government is incorrect for a couple of reasons.

First of all, as we say in our briefs, your Honor, the *Bowman* opinion doesn't stand for that far reaching proposal. And the government's broad reading of *Bowman* just hasn't survived the day. *RJR*, the Supreme Court's decisions in RJR and *Kiobel* and *Morrison* make very clear that the presumption has to be applied in every case. And one thing, one case that sort of I think addresses this pretty cleanly is *United States v. Garcia Sota*, which is a 2020 D.C. Circuit case, and that addressed a statute that is unquestionably aimed at protecting the right of the government to defend itself. It's one of those statutes. It's 18 U.S.C. 1114, which is a statute dealing with the killing of an officer, an employee of

the United States.

And the court explained that the court did not apply the *Bowman* rule that the government is arguing for here, explained that that broad rule that is being argued for here would render almost all of the discussion in the *Bowman* case itself as surplusage, and would purport to rebut the presumption against extraterritoriality in broad swaths of the U.S. Code. And in that case, the D.C. Circuit ruled that *Bowman* -- the court rejected the argument that it shouldn't apply the presumption, and ruled that there was no permissible domestic application of the statute and overturned the conviction under 114. So I think analytically that's kind of the squarest one that shows that the government's *Bowman* argument is not right.

And in the Second Circuit, since *RJR* in particular, I think that there was -- there's been a gradual recognition of the dominance of this framework. But really since *RJR* in March of '16 the Second Circuit has applied the two-step framework both in civil and criminal cases, and the government cannot cite a single Appellate decision that's issued after *RJR* that supports its position that *Bowman* overrides the modern framework.

THE COURT: Let me just ask you the question. Is there a substantive difference between *RJR* and *Morrison* in terms of what the Supreme Court has said the test is?

MR. ALBERT: Your Honor, I don't know that there is, but I think having lived through it, people thought, well, *Morrison* is very -- it's a securities laws, that's always been a weird animal. In *Morrison* the Supreme Court was really dealing with a big doctrine in the Second Circuit that it found to be very amorphous. And it was just not so clear, even though the language of it, your Honor, I think the language of it said, it applies in all cases. It was a strongly written decision by Justice Scalera in his customary way, but not everybody fully accepted that it meant all statutes. And it was the subsequent decisions, like *RJR* that really underscored it. So for a couple of years, you see some cases, including in this circuit, where the court was less sure.

And there are some district court decisions that say, well, it's not so clear if this applies to criminal cases. But over the years, that doubt has been erased by the Supreme Court and by the Second Circuit. I mean, I could talk about some of those cases, but I think the reality is that the language was clear and blunt in *Morrison*, but it wasn't so clear to the observing world, lawyers and judges, that it cut as broadly as it does.

So, your Honor, just turning to the application of the rule. The conduct alleged in this indictment is impermissibly extraterritoriality. At step one, I don't think there's a lot of dispute at step one under the analysis. You look to see

whether the statute gives a clear affirmative indication that applies extraterritorially. Section 371 doesn't. The government doesn't argue otherwise. We move to step two.

Step two, the first step of step two is, look at what's the focus. We're determining whether this is a domestic application. What's the focus, and then did the conduct that relates to the focus take place in the United States. Now, if you look at page 23 of the government's brief, and the government can speak to this, but I look at page 23 of government's brief. And they say they accept there that the focus of 371 is to prevent acts of deceit, craft and trickery that impede the IRS, but the focus is deceit, craft and trickery.

All of those, all of the acts of deceit, craft and trickery, all the deceptive conduct in this case, as well as the conspiratorial agreement itself took place outside of the United States. None of the defendants lived in the U.S. or was a U.S. citizen. None of the defendants are alleged to have traveled to the U.S. as part of the conspiracy, not one meeting is alleged to have occurred in the United States, not a single email relating to the scheme or otherwise is claimed to have been sent to the United States. The nimiety entities and bank accounts that were allegedly created to further the conspiracy, none of them were based in the United States. The round trips of funds were from Switzerland, between Switzerland, Hong Kong

and Singapore, and every single overt act in the indictment.

So the government argues based on domestic events, the government's argument on this is based on domestic events that are not within the focus of the statute. Particularly the government's relying on the acts of the taxpayers, tax filings. They also talk about carrying cash and limited financial contacts with the United States.

With regard to the clients. The government chose to charge this case in a particular way, which is *Klein*, and it's not -- they chose not to file it, as they have in many other cases, as a conspiracy to file false tax returns or to evade taxes. If it had done that, then the actions of filing a false tax return or evading taxes would very likely have fallen within the focus of the statute, and they would have that domestic application, but they did not. They chose to indictment this case as a *Klein* conspiracy. And it wasn't an accident. I mean, I can't believe that it was an accident, because they get a benefit from that. And the benefit is that it draws the focus onto the defendants, who are in Switzerland and traveling in Asia, and away from the taxpayers.

But it cabins -- and, your Honor, the government has lost these kinds of cases by charging conspiracy to evade taxes or conspiracy to file false tax returns. The perception has been because the argument is, these Swiss bankers are worrying about their obligation in Switzerland under Swiss law, the

obligation to file taxes is the American taxpayers. That's not the Swiss people's obligation.

The focus of those cases when you charge it in the way that pulls it to America, sufficiently to make it a domestic application, you suffer the detriment of putting focus on the American taxpayers, which the government I believe charged the way it did to avoid that. And that puts it in this position of other cases where like *Prime International* and *Laydon* where the deceptive conduct happens all overseas, but there's perhaps an impact in the United States. Those cases, *Laydon* and *Prime International* are good examples where the court focuses on the conduct that's relevant to the focus of the statute and says, There is some incidental effects in the U.S. There's incidental conduct in the U.S., but the focus conduct is overseas, and so it's not a domestic application.

As your Honor probably -- your Honor focused on the language of *Morrison*. There's that memorable phrase that the presumption would be a Craven Watchdog indeed if it retreated into its kennel anytime there's any contact with the U.S. There's always going to be some contact with the U.S. The question is, Is it conduct related to the focus of the statute, and it is not here. The contacts at issue, the financial contacts and the bank account transfers are really outside the focus. They're not the deceptive conduct.

And on that, it's important to, I think, distinguish

between a wire fraud case, which would be *Napout*, or a sanctions case, which is the district court case *Zarrab* where the wires -- the Second Circuit has ruled that the use of the wires is the focus of the wire fraud statute. And in *Zarrab*, it's a sanctions case, moving monies into or through the United States is the heart of the violation. Here, the heart of the violation is the deceptive conduct and it's all overseas.

I just want to point out, your Honor, to bring this toward the conclusion that the problems of the *Klein* doctrine itself sort of exacerbate -- they're exacerbated in this case where there's extraterritoriality problems because *Klein* is really a common law crime. And there's no -- you can't do the kind of analysis of Congress's intent as to extraterritoriality that you'd like to do, because the whole doctrine is really pretty well-unmoored from the statute. I think *Klein* is an example of a doctrine that like your Honor maybe followed the *Ciminelli* case that was just argued in the Supreme Court, Second Circuit's longstanding right to control theory, which is an expansion of the concept of defraud. It's going to lose nine nothing in the Supreme Court.

Klein has maybe a longer pedigree than right to control, but it is an old fashion broad expansion of the concept of defraud. The Second Circuit in the *Coplan* case really sort of presaged that it's a very problematic doctrine. It should not be expanded, and we should not be talking

about -- it should not be expanded in this case, and we should not be talking about doing what Congress would have wanted with this doctrine that it really did not create.

THE COURT: Good. Thank you very much, counsel.

Let me hear from counsel for defendant regarding what I'll describe as bucket three. Please, proceed.

MR. TEMKIN: Thank you, your Honor.

Very, very briefly. We have asked -- the pretrial disclosure aspect of the motion deals with two points. One is a bill of particulars regarding co-conspirators, identifying unindicted co-conspirators. And the second is the timing and sequence of pretrial exchanges of witness list and 3500 material and impeachment material, etc.

With respect to the bill of particulars. Many, many cases, defense lawyers send the government 15-page letters requesting all sorts of particulars. Tell me when my client did this, and identify each and every instance in which my client -- in which the conspiracy engaged in any overt act or anything. I will admit to being guilty of submitting such requests for particulars. We did not do that in this case.

In this case we asked for one thing, a list of unindicted co-conspirators. And the Second Circuit -- I'm sorry, the Southern District, Judge Scheindlin's decision in *Akami* sets forth the six factors that generally apply and agreed upon as to when such particulars are appropriate.

Number one -- we go through the factors. The first is the number of co-conspirators that could possibly exist. Now, there are dozens in this case. We go through the discovery, there are dozens and dozens of names.

Second is the duration and breadth of the alleged conspiracy. The indictment charges a conspiracy that extended for six years and included, I believe it's about five companies. The third factor is whether the government has provided, otherwise provided adequate notice of the particulars. The indictment, unlike virtually any other indictment I've seen in this district, this indictment does not identify a single unindicted co-conspirator. In fact, we're somewhat surprised when the government responded to our extraterritoriality motion by saying, Well, the taxpayers are unindicted co-conspirators.

Well, that's not in the indictment. They're referred to as client-1, client-2, not a co-conspirator not named as a defendant herein. And Mr. Albert addressed why that is, and quite frankly it's because each of those clients, two of the three clients participated in the voluntary disclosure program. And the government and the IRS in its wisdom decided that they would not be prosecuted, that they would be given immunity from prosecution by virtue of their participation in the voluntary disclosure program. So the government did not provide adequate -- otherwise provide adequate notice of the identity

of the co-conspirators.

The volume of the pretrial discovery. We have 24,000 documents, 171,000 pages. Quite frankly, the discovery doesn't say which of the individuals identified on page 522 of document 20,000. It doesn't say, Oh, that individual is a non-indicted co-conspirator. The discovery doesn't reveal whether the government is going to claim at trial that an individual is an unindicted co-conspirator. Potential danger to co-conspirators. If the government were to make such disclosure, no allegation of that, no suggestion of that. This is a white collar case. There's no indication that there's any fear that someone would be in danger.

And finally, the potential harm to the government's investigation. The investigation here started in 2014. The conduct. The government's last overt act occurred in October of 2014. It is impossible to envision any prejudice that the government could suffer if eight years, coming on nine years after the investigation started it were required to land and tell us who it believes are unindicted co-conspirators.

Now in response to our motion, the government sort of does the general boiler point in terms of you don't get the whens, wheres and with whoms. But interestingly, two of the cases the government cites, both *Feola* and *Cohen*, while denying certain particulars, in fact grants the particulars that we're seeking, which is the list of unindicted co-conspirators. So,

your Honor, we would ask that your Honor direct the government to provide such particulars.

With respect to disclosure of trial materials. In relatively complicated white collar cases, government frequently agrees and the court frequently orders the government to provide witness list, 3500 material, exhibit list, exhibits, and impeachment material in advance of trial, significantly in advance of trial. And the government is right, there is no legal mandate that it provide 3500 material in advance. There is a legal mandate that it provide impeachment material with sufficient advance notice so that we will be able to make use of it.

And part of the problem here is, is that we suspect that many of the government witnesses will be from outside the United States. Which means that if we get some information on the eve of trial, we now need to hire investigators in Switzerland or in Singapore or in Hong Kong to try to explore and make use of the information that we get from the government. And so sort of waiting until the eleventh hour to provide that information, while it might be all well and good in a simple one week narcotics case where there's reason to be concerned that there might be some risk or danger to witnesses, this is a different animal. And if we're going to be able to make use of the materials, we're going to need some advance notice.

With respect to exhibits. Like I just said, we have 24,000 documents. I don't know which one of those 24,000 the government intends to offer at trial, and we shouldn't be in a position where we're sitting here just before trial and trying to guess. Now we ask for 60 days in advance of the motion *in limine* date. And the reason why we did that is, is if we're going to make meaningful motions *in limine* addressed to the government exhibits, we need to know what those exhibits are.

Now, if your Honor is not going to hold us to the motion *in limine* date, then 60 days before trial, we would ask for that. But we do think that we need the materials in advance of -- sufficiently in advance of our deadlines for making motions addressed to documents and witnesses so that we can actually make meaningful motions to your Honor. What I really don't want to do is draft motions sort of guessing, Well, the government might offer this and it might offer that, and devote hundreds of hours of our time to preparing motions and then have the government say, Well, we're not planning to offer that document. That would be quite frankly gamesmanship to an inappropriate level.

Finally, your Honor, when we initially spoke with the government about this issue, the government had suggested simultaneous exchange. And as we've written to your Honor, both because of the burden of proof and the sequence in which evidence is presented at trial, we think simultaneous

disclosure is inappropriate, and that it should be staggered with the government going first, and then our providing our disclosures after the government provides its.

THE COURT: Thank you very much.

Counsel for the United States, I've heard from the defense. I'm happy to hear from you with respect to any of the issues raised. I have some questions for you, but I'm happy to hear any argument that you wish to present to the Court, either to respond to the arguments presented by counsel for defendant or to add to or amplify points that were made in your briefing. Counsel.

MS. DAVIS: Your Honor, with the Court's permission, I'll address the statute of limitations argument. Mr. Magnani is planning to address the extraterritoriality argument, and Mr. Zverovich the discovery part.

THE COURT: That's fine. Please proceed.

MS. DAVIS: Your Honor, as the defendant has said, they don't contest the legitimacy of the government's initial sealing of the indictment. And I should have mentioned, I prefer to keep my mask on. But if it's too difficult for the Court to hear me, I'm happy to take it off.

THE COURT: Thank you. I don't mind if you leave it on if you feel more comfortable, please just bring the microphone as close to your face as possible so that the court reporter and I can hear you clearly.

MS. DAVIS: Yes, your Honor.

THE COURT: Thank you.

MS. DAVIS: The defense, however, is challenging the government's continued sealing of the indictment while it tried to effectuate the arrest of the offshore defendants. There is no dispute that the government cannot extradite defendants from Switzerland on criminal tax charges. And as the government pointed out in its briefing, while there is on paper an extradition treaty between the United States and Hong Kong where Defendant Sage lives, the extradition treaty has in fact been suspended; and therefore the government is unable to take advantage of that with respect to Defendant Sage. So the government after it sealed the indictment initially was in a position where the only reasonable chance to arrest the defendants was if they chose to travel.

Now, the defense argument that the conversation in which Mr. Temkin and Mr. Albert offered to have Mr. Walchli come to the United States to face charges if there's a reasonable bail package simply cannot be a trigger for requiring the unsealing of an indictment. Essentially what that means is that any defense counsel, all they would have to do is have that conversation, and the whole sealing and arrest regime that has existed for many, many years would essentially fall to the wayside.

Here, the Second Circuit forecloses in fact the

defendant's argument because the Second Circuit has held in *Watson* and in *Muse* that it is permissible, even if one defendant is available to be arrested, that the government may seal the indictment to attempt to effectuate the arrest of other defendants. And that's exactly what we tried to do here, your Honor, through the use of Interpol Red Notices, which is the typical way that the government can seek the arrest of offshore defendants.

And, in fact, the government -- the calculus of the government that perhaps there might be travel by defendants, especially in light of easing of Covid restrictions, the reopening of borders, the rise of vaccine usage, the government in fact was correct in its assessment. Now, the defense has suggested that the governments was unreasonable in continuing to seal the indictment in light of the purported awareness of the investigation, but we saw with the arrest of Defendant Lampert, and the arrest of Defendant Ruegg that there are in fact different risk tolerances; that it was worth the effort to unseal in order to try to arrest. The fact that we were ultimately unsuccessful in getting the extradition of those defendants is of no moment, your Honor.

The question is whether at the time we sealed and continued the sealing of the indictment, that was a reasonable choice of the government. Courts have recognized that the government has an interest, a legitimate prosecutorial interest

in arresting defendants who are indicted. And I would say, your Honor, in this particular case, I suppose we could have indicted and then unsealed as the defense counsel has suggested. But that's essentially throwing up our hands and saying, Hey, we're okay with these guys staying in Switzerland for the rest of their lives and not coming to the U.S. to face charges. Other prosecution teams have made that choice. We chose to try to see if we could arrest them. That's a completely legitimate and reasonable choice by the government, and proper exercise of prosecutorial discretion.

The defense, in fact, cites no case that the mere offer by a defense counsel for a client to come to face charges should, as a matter of law, trigger the unsealing of an indictment, and it really doesn't make any sense when you think about it, your Honor, for that to be the governing law would essentially render the whole unsealing and arrest process a nullity.

The fact of Mr. Lampert's arrest in February of 2021, doesn't change that calculus. First of all, the only defendant besides Mr. Lampert of whom we have evidence that they knew of that arrest was Defendant Walchli based on Mr. Temkin's declaration. As we sit here today, I don't know and the defendant hasn't offered any evidence that any of the other defendants knew of that arrest. And, in fact, there is a suggestion to the contrary. And how do we know that, because

Defendant Ruegg who was, in fact, still an employee of IHAG at the time that he traveled in the summer of 2021, left Switzerland, went to Spain, got arrested.

The fact that he jumped bail and absconded back to Switzerland doesn't negate the fact that in fact the government's calculus was reasonable. We were able to arrest him. And, frankly, I believe he would have been extradited had he not jump bail and returned to Switzerland. And in fact hereto, the defense points to no case law that says that the arrest of one defendant mandates that the indictment be unsealed. Here, at the time of Lampert's arrest, it was a situation of uncertainty. The fact that we do not have an extradition treaty with a country does not necessarily mean that a defendant will not be returned to the U.S. to face charges. There are ways other than formal extradition that countries sometimes agree to provide assistance to the United States.

But I think that the question, your Honor, is whether the government had a legitimate interest in trying to effectuate the arrest. The Second Circuit has recognized the legitimacy of that interest. And as soon as it became clear that there had been publicity about the case, and it became clear that a continued sealing would not be effectual, we moved to unseal the indictment. It was five and a half months after the expiration of the statute of limitations period.

I don't think the Court need to address what the outer limit or what the line drawing would be. I think it's sufficient to find that, as the Second Circuit has recognized, it is a legitimate purpose for the government to try to seek the arrest of co-defendants, even if you have one defendant willing and able to be arrested. I don't think that the government should be in a position, especially with these offshore defendants, where essentially you can indict, but you can't try reasonably to arrest them.

The *Gigante* case and the *Rogers* case that the defendant cite actually don't help the defendant. They're single defendant cases, not multi-defendant cases. And in both of those cases, the proffered reason for the sealing was obviously not to effectuate the arrest of co-defendants, but to continue on with the respective investigations, which the respective courts found was not a sufficient reason to seal the indictment. And in fact, the *Gigante* case itself acknowledges and recognizes that the *Watson* case stands for the proposition that the government may seal an indictment to avoid tipping off other defendants about the existence of an indictment in order to try to effectuate arrest.

And importantly, your Honor, at no time, either in the briefing or in their argument has the defendant articulated one iota of prejudice that was suffered by the defendant during the

period of sealing. And that's important because the *Watson* case acknowledge and stated that if there is a situation of actual prejudice suffered by the defendant, then that can obviate the government's legitimate need for sealing, but that's not what we have here. There's been no assertion of any sort of prejudice. And I understand you may have questions, happy to entertain whatever question you might have, your Honor.

THE COURT: Thank you. That's fine. I'll hear next regarding the issue of the applicability of *Klein* and the extraterritoriality application of it.

MR. MAGNANI: Your Honor, I prefer to take my mask off if that's okay.

THE COURT: That's fine.

MR. MAGNANI: Christopher Magnani for the United States. Good afternoon, your Honor. It's nice to meet you. This is the defendant's motion. And in the defendant's motion, he's asking for what the Court has described as an extraordinary remedy that's limited to extremely unusual circumstances. And he's asked for that without any case law that binds the Court to give the relief that he seeks.

So while not styled this way, the government's construing this as a 12(b)(3)(B) motion, a motion to dismiss for failure to state a claim, which both of the two arguments relating to *Klein* apply to. In other words, that an offense is

not pleaded in the indictment. And there's three things that the defense is asking this Court to do, none of which are precedented, or none of which appear precedented, or which the defendant's paper cannot cite a precedent.

The first thing is the defendant is asking this Court to hold that a conspiracy to defraud the United States, a *Klein* conspiracy, or what we sometimes call a defraud prong conspiracy, that that offense does not apply extraterritorially. No court has held that. The defendant is then asking this Court to move onto what it says is step two of *Nabisco*, and to make rulings that, one, the focus of the *Klein* status -- which again no court has said what the focus is. Mr. Albert said that we agreed with what they described it as, which is something about deceit, craft or trickery. I don't think it's fair to say we agree, but we sort of assumed arguendo because no court has grappled with determining what the focus of the statute is, which inquires the Court to look into what the Supreme Court calls, The object of its solicitude, and it's pretty in the weeds, and the Court need not decide that.

The third thing which is unprecedented which the defendant is asking this Court to do is to dismiss an indictment based on the fact that the indictments allegations are not detailed enough and do not allege a sufficient enough domestic nexus. There's no case that the defense has cited

that show the court doing exactly that. Civil cases are a little different than criminal cases. So in civil cases, a lot of times things are decided on the pleadings, but most of the cases that are cited here -- and there are some motion to dismiss cases cited here, but most of theme are related to appeals after there's been a trail, and the court can determine whether or not there's sufficient evidence of a domestic nexus.

Now your Honor invited us to talk about things -- because the Court's of course aware of our arguments in the filings. And so I do want to just focus on the things that either were not really emphasized in our opposition for the Court. And the first -- and this is going to be good news for everybody is, I actually don't think this argument over whether *RJR* applies is of any moment.

Now, the United States has argued that *Bowman* basically creates an exception; in other words, an exception to the normal application of the presumption against extraterritoriality application of the law. And the reason why the United States framed it that way is because that's the way *Bowman* itself phrased it, and that's the way the Second Circuit phrased it in *Vilar*. But now that, as defense points out, the Second Circuit has done the Nabisco -- or the *RJR Nabisco* two step in criminal cases, we don't have an issue with that.

But what we would say is that, to the extent that that's the way the Court wants to analyze it, we would say that

when it comes to *Bowman* type offenses -- in other words, *Bowman* distinguishes between two types of crimes, crimes against persons and property, and crimes that, among other things, include the right of the government to defend itself. And I'm going to refer those as *Bowman* type crimes. With *Bowman* type crimes, we would say the first step has past. In other words, there's a clear indication --

THE COURT: Let me just pause you. I'm not sure that your argument is on all fours with what you wrote in your briefing. My understanding of the government's argument is that, what you're describing now as *Bowman* type crimes. And as the Second Circuit has described in *Vilar* are just offenses to which the presumption established in *Morrison* and *RJR* do not apply. You seem to now be saying that it does apply, and it impacts how I thread it through the two step process.

Is the government either changing its position, or am I misunderstanding what you wrote in your briefing?

MR. MAGNANI: No, your Honor. I'm just not being clear. You're correct. That is the way we framed it in our papers. I'm just explaining that the reason we framed it that way is because *Bowman* itself and *Vilar* use the language of the presumption of statutory interpretation that we're talking about here, about the presumption not applying.

But what I'm also saying is that -- and the reason I'm bringing this up is because, although *Bowman* was not mentioned

in any of the merits briefs in *Morrison*, *Kiobel* and *RJR Nabisco*, the United States did in a footnote in its *RJR* brief mention it. And it basically said that the United States believes *Bowman* type crimes satisfy the clear indicia of extraterritoriality. I guess what I'm saying, your Honor, is it doesn't matter how the Court looks at it, whether it goes with the way we put in our papers that the presumption doesn't apply, or whether it goes with what the defense is saying, the presumption always applies. But then we would just say, but it's always satisfied. The presumption is always rebutted when it comes to a *Bowman* type crime.

Because any other interpretation would not make any sense because it would create these immunities, exactly what *Bowman* talks about, it would create an immunity for foreigners who are trying to injure the United States. That's one of the things just that basically whether you do the *Nabisco* two step or not, it doesn't change the outcome at all. We would just say that if you do engage in that two-step framework, the first step is satisfied. Whereas Mr. Albert said that he believe that we would concede that the first step was not satisfied. That's not correct.

The second thing I wanted to touch on -- and actually was some of the cases that the defendant cited only in his reply brief. And actually one of them is the case that Mr. Albert cited to your Honor here from this podium, which is

the case called -- it's the D.C. Circuit case *Garcia* Sota. And in *Garcia Sota*, reading it in the defendant's brief, it does seem like a big problem for our argument, but it's not for three reasons that the defendant didn't mention in his reply brief, and didn't mention from the podium.

The first reason is that the statute in question 1114 which criminalizes killing U.S. officials, that statute was deemed to apply extraterritorially in the Second Circuit twice. In two of the cases we cited, both in *Siddiqui* and in *Al Kassar*, the Second Circuit found different from the D.C. Circuit, that that statute did have extraterritorial application.

Secondly, the analysis that the D.C. Circuit did in that case, it was a little more nuanced, and it involved the interplay between 1114 and 116. So you see 1114 did not have any express extraterritorial application language, but 1116 did. And so when the D.C. Circuit looked at those two together, it determined that 1116 would have applied, but 1114 just didn't. It was just the wrong statute, so it was a little more of a nuanced analysis. And the third thing is that the D.C. Circuit at that time was bound by an earlier -- and it cites to this case, an earlier 2004 D.C. Circuit case, which it cites in the opinion, and it is called *Delgado Garcia*.

And in *Delgado Garcia*, the D.C. Circuit basically came up with a way to read *Bowman* that was a little different than

other circuits and different from the Second Circuit.

THE COURT: Can I just ask, why doesn't that end the analysis from the government's perspective? Why aren't you just telling me that my circuit says X?

MR. MAGNANI: The reason, your Honor, is because *Siddiqui* and *Al Kassar* also have some problematic language which we don't agree. And so although *I think* -- *Vilar* is actually -- I'll answer it this way.

Your Honor asked a question at one point, Is there a substantive difference between *Morrison* and *RJR*. And my answer to that question would be no. And the reason is because when the Supreme Court decided *RJR*, it explained that that two step was nothing new, it was just what came out of *Morrison* and *Kiobel*. And so *Vilar* is a great example of that. So in *Vilar*, which the defense complains is a pre-*RJR* case, it's of no moment. And the reason is because in *Vilar* they applied the presumption against extraterritorial application to a criminal securities fraud case.

In other words, what was a civil 10(b)(5) securities fraud case in *Morrison*, the Second Circuit in *Vilar* said, this applies to criminal as well and it kicked the conviction or it remanded. So I don't think that -- anyway, so the point is I don't want to -- we back away from some of the language in *Siddiqui* and *Al Kassar*, because I think those cases may have the mistaken language about the cannon of statutory

interpretation not applying to criminal cases. We acknowledge that it of course applies to criminal cases. But also there are some important differences between the trio of civil cases that the Supreme Court ruled on and criminal cases. The three Supreme Court cases, *Morrison*, *Kiobel* and *RJR*, all of them involved foreign individuals or foreign governments using U.S. courts and U.S. laws to sue foreign companies for rights of actions that presumably they could have -- they could have prosecuted in other jurisdictions.

It's very different in this case. In a criminal case, the United States can only vindicate its rights here. In other words, if you extended the defendant's argument or the defendant's argument that defraud prong conspiracies to defraud the United States did not apply extraterritorially, the United States would have no other venue to prosecute these kind of offenses, whether it's contractors in Afghanistan or bankers in Switzerland. If we can't prosecute those cases here, we have no other remedy, unlike all the civil litigants in those other cases. Which again, all involve foreign plaintiffs and foreign defendants.

Finally, the third thing I wanted to mention -- and by the way, the point about the cases that were cited only in the reply brief, I don't have to get into it, but the defense also cited some Second Circuit cases; namely, *Hoskins* and *Epskamp* --

THE COURT: Sorry, before you move on. You spent

sometime on this issue to walk away from *Siddiqui*, doesn't the Circuit already do that in *Vilar*?

MR. MAGNANI: Yes, your Honor. In other words, in our brief we gave a long string cite to many Second Circuit cases from 2000 -- from pre-*Morrison* times to post-*Morrison* times. And in some of those earlier cases -- and I think *Siddiqui* and *Al Kassar* are two of them. They do use that problematic language. But, yes, it's clear, all the parties agree, this cannon of statutory interpretation applies in criminal and civil cases.

THE COURT: Thank you. You can proceed.

MR. MAGNANI: And I don't think it's worth necessarily getting into, but to the extent that the Court is concerned about or thinks the cites to *Hoskins* or *Epskamp* are persuasive. Again, those cases are also very distinguishable in ways that are not mentioned in the defendant's reply brief. And so to the extent the Court's interested in that, I'm happy to go into it.

THE COURT: Thank you. I don't want to spend a lot of time with that, nor do I think I need to spend a lot of time with this other issue, but you raised it so I will.

Under this alternative framing of how to approach *Bowman* and *Vilar* in light of the language in *Morrison*, you tell me that I should see *Vilar* and *Bowman* as satisfying the first prong of the Supreme Court's test stated in *Morrison*, and even

more clearly stated in *RJR*. That step is whether the statute gives a clear affirmative indication that it applies extraterritoriality. How does your argument work? In other words, if this is not language that's in the statute, how would you have me take it that the language from these cases then satisfies that first step which is tethered to the text of the statute?

MR. MAGNANI: Your Honor, I think we're all actually in the agreement that the text of the statute is the thing that controls. And the only thing I would just add to your Honor's recitation of *RJR*, is it goes on to say, An express statement of extraterritoriality is not essential. Assuredly, context can be consulted as well. And in *RJR* the court went on to say that in that case, Context was dispositive. To give some examples of what I mean --

THE COURT: Sorry, just to be clear, and I don't want to spend a lot of time on this. But, regardless of the later text to which you point me, the first step looks at the statute, not some Supreme Court decision from decades ago, almost a hundred years ago. So how is it that in this construction I read the decisions of these court cases to check the box for statutory text that the Supreme Court tells me should be based on the text of the statute?

MR. MAGNANI: The answer is, in *Bowman*, the court did exactly this. So the lower court in *Bowman* made a mistake and

thought that this was a jurisdictional question. The *Bowman* court, the Supreme Court, did the textual analysis. But what it explained was that, there are other things to look at other than where statute is. *Bowman* actually gives a lot of examples of other statutes that would overcome the presumption. Or again to use *Bowman*'s framework, to which the presumption would not apply.

And the examples it gives include forging a ship's papers. In other words, it doesn't say it applies extraterritorially, but obviously Congress would have wanted it to in case people did that on the high seas. It also gives examples about enticing desertion from the naval service. Again, no language specifically about extraterritoriality, but it's obvious from the context and the language in the text that it was meant to apply overseas, same for bribing a U.S. military officer.

THE COURT: Thank you. Good. Understood.

MR. MAGNANI: At the end of day what *Bowman* does with the predecessor statute is it says, Congress wrote a statute that's design to protect the United States government from conspiracies to defraud it. It would not have intended to create immunities for overseas people who do that. And that's why I give the example of whether it's the Swiss banker or the contractors in Afghanistan.

So the last thing, the third thing that I just had

was -- and this is something that we actually don't -- we didn't really focus on in our briefs. And I touched on it a little bit in the beginning, was just procedurally, to the extent that the Court, step one, agrees with the defense that this statute does not apply extraterritorially; and step two, agrees that the focus of the statute is what the defendant says it is. If the Court gets to that second step of *Nabisco* to decide whether this is a permissible domestic application, we would submit that this is not the time to do it. And the reason is -- well, there are a few reasons.

The first is that at this stage, in the motion to dismiss stage, the Court has to assume all the factual allegations in the indictment are true. One of those allegations in the indictment is that the defendant and others, known and unknown, conspired to defraud the United States in the Southern District of New York and elsewhere. Having to assume that that's true at this point, the Court would have to deny this.

And that's why I was pointing out before how most of the cases we're hooking at here are Appellate cases after there's been evidence at trial. Because as the Court knows, the United States is obviously not limited in its presentation of evidence by what it's alleged in the indictment. In fact, there's not really much required of the United States to allege in an indictment. It really need only allege the statutory

language, and give enough detail to prevent the defendant from being tried twice for the same crime and to give sufficient notice. So if a boilerplate indictment would have been enough, something with just the statutory language, then the Court should not look at the other allegations in the indictment to determine whether that's sufficient to meet step two of whether this is a domestic application.

That's the defense just wanting the Court to engage in just basically sort of a summary judgment, because there be other evidence at trial, including, for example -- and this one we did mention in our briefs. We expect that the evidence at trial will include American taxpayers talking about filing false tax returns in the United States. There's a number of things, and we do go over them in our brief, so I won't repeat them all now. But pages 22 to 26 of our filing go into domestic allegations that are alleged in the indictment, but the Court -- it would be inappropriate for the Court to limit itself only to that at this stage, because the indictment is sufficient, in that it tracks the statutory allegations and it does allege that the conspiracy was in the Southern District and elsewhere.

THE COURT: Thank you.

MR. MAGNANI: One other thing. Sorry, your Honor. I was just sort of looking at my notes from Mr. Albert's argument. Mr. Albert was talking about how *Zarrab* was a

sanctions case, and he's not wrong. I think it was an IEPA case, but there's also a *Klein* conspiracy charged there. And so that's another one of these cases where -- and actually, I think that's one of the cases where the Court did find there was sufficient domestic nexus, but I just wanted to point out that there was a *Klein* conspiracy charged there as well. Because *Klein* conspiracies are not only conspiracies to defraud the IRS, but can also be to defraud other agencies of the United States, so a sanctions violation could be charged under *Klein* or *Hammerschmidt* doctrine. Unless there any questions, your Honor, that's all I have.

THE COURT: Just a brief one. Counsel for defendant pointed us to *Ciminelli*, and I'm not going to make any predictions about how that case is going to come down, but my recollection is that the government changed its position in the arguments about whether or not the argument presented by the prosecution to the trial court was actually a legitimate theory. So I just want to inquire to ensure that the government has made sure that the Solicitor General is going to stand behind the feasibility of a *Klein* conspiracy on the basis that the government is pursuing here.

Any comment, counsel?

MR. MAGNANI: No comment, your Honor. Only that at this time the Court is still bound by *Coplan*. So regardless to anything that we advance, Coplan is the law of the Circuit, and

it's pretty clear on the *Klein* conspiracy doctrine.

THE COURT: Thank you. Good.

Any brief rebuttal? I'm sorry, let me hear from counsel for the United States on the discovery related issues.

MS. ZVEROVICH: Thank you, your Honor. Olga Zverovich, and I will be brief with respect to the discovery issues unless the Court has questions.

With respect to the defendant's request for a bill of particulars. The law is clear that a bill of particulars is not a general investigatory tool. The sole purpose of a bill of particulars is to furnish facts that are necessary to apprise the defendant of the charges against him in order to allow him to prepare his defense, avoid unfair surprise, and plead double jeopardy. In this case, a bill of particulars is not necessary because the government's disclosures in this case are more than sufficient to apprise the defendant of the charges against him.

First, the government has filed a very detailed indictment. It spans several dozen pages, and it sets forth the scheme in a lot of details.

THE COURT: Let me just focus you on this, counsel. They're only asking for the identity of the asserted co-conspirators. Do any of the materials identify who the alleged co-conspirators are?

MS. ZVEROVICH: Yes, your Honor. The government in

this case provided discovery which was organized and provided to counsel in searchable format. That discovery includes, among other things, emails among various co-conspirators. It includes bank records relevant to the transactions at issue in the scheme. And again, that discovery was provided in an easily digestible searchable format.

THE COURT: Thank you. But in saying that, is it searchable by conspirator, yes, no? In other words, how is the defense to ascertain from the materials that you provided who the government asserts is a co-conspirator of the defendant here?

MS. ZVEROVICH: No, your Honor. It is not searchable in that way. It is word searchable. But, your Honor, the law in this Circuit is clear that an indictment need not identify every single person who is involved in a conspiracy or, every single overt act that's committed in furtherance of the conspiracy.

In this case, the indictment is particularly detailed. It does not identify each and every person involved, but the discovery does provide additional information about that. So there could be emails in which other folks are copied, etc. And so in the government's view under the clear law in this Circuit, a bill of particulars is not required under the law.

THE COURT: Thank you. Let me just ask. Your colleague just referred to tax filings having been made in the

United States and that there will be evidence of that at trial. I've also heard during the course of today's argument that the government may have provided immunity to certain U.S. taxpayers who may have taken advantage of the -- I'll call it, the benefits of the asserted scheme.

Is the government taking the position that those taxpayers are co-conspirators?

MS. ZVEROVICH: We are, your Honor.

THE COURT: Thank you. Did the defendant know that before today?

MS. ZVEROVICH: I believe we made that point in our briefing, your Honor.

THE COURT: Thank you. You can proceed.

MS. ZVEROVICH: Thank you, your Honor.

And then with respect to the scheduling question. I will not spend very much time on it. We pointed out in our briefing that the schedule that the defendant proposed in their opening papers would essentially mean that all of the government's trial materials would be due five months before the trial date, which really is an unprecedented and extraordinarily early schedule.

We haven't found any case in which such a schedule was ordered by the court. We counter-proposed with what I think is a reasonable schedule, which is to produce those materials three weeks before the trial date. I think the suggestion that

this will prevent the defendant from filing motions *in limine* should not be accepted by the Court. I think it's typical for parties to file motions *in limine* before exhibits and *Jencks* Act materials are produced. To the extent there are supplemental issues to take up with the Court, we can do that at the final pretrial conference.

THE COURT: Let me just ask, I saw from your submissions that you proposed to provide the materials to the defense on the 15th of May, that is three weeks prior to trial. What's the magic of three weeks? Could you do it four weeks before trial?

MS. ZVETOVICH: Your Honor, there's no magic to that date. We picked it as a reasonable date consistent with our schedules set in similar cases. Four weeks is fine.

THE COURT: Thank you.

MS. ZVETOVICH: Your Honor, I'll just finally note that --

THE COURT: Let me just pause. I apologize. No, go ahead, counsel. I apologize.

MS. ZVETOVICH: Thank you, your Honor.

Just one other note which is that in producing the Rule 16 materials in this case, we actually already produced to the defense most of the witness statements at issue in this case. We did that without having an obligation to do that, and so they already have most of the witness statements. To the

extent they need to investigate or hire investigators to speak with people abroad, they already have the information they need to do that.

THE COURT: Good. Thank you. Just briefly, counsel. Counsel for defendant asserted that there's no risk to the potential co-conspirators here were I to order bill of particulars consistent with their request. Does the government have any comment on that proffer?

MS. ZVETOVICH: Your Honor, we're not alleging that that factor in itself supports a denial of the bill of particulars, but we are saying that the balance of the factors does.

THE COURT: Thank you. Good. Anything else, counsel?

MS. ZVETOVICH: No, your Honor. Thank you.

THE COURT: Good. Thank very much. Counsel for defendant, any brief rebuttal?

MR. TEMKIN: Very briefly, your Honor.

On the statute of limitations, and I think Mr. Albert may have some brief comments on the extraterritoriality. First, with respect to the argument that we have not established prejudice. Your Honor, the law is crystal clear. The government has the burden to justify the sealing of the indictment. And if the statute of limitations ran, because it did not, could not justify the running of the sealing of the indictment and the tolling of the statute, if the statute of

limitations ran, the case is dismissed. No prejudice is required, if the statute of limitations ran.

Second, government still hasn't said what it did other than Red Notices to effectuate the arrest of defendants in jurisdictions from which they could not be extradited, and so therefore we are dealing in the realm of speculation, not sort of good exercise of prosecutorial discretion.

Third, our offer to -- Mr. Walchli's offer to appear in this court did not in and of itself trigger the requirement that it unseal as to all defendants. What it did do was it precludes them from saying that it was justified in keeping the indictment sealed and running the statute of limitations as to Mr. Walchli.

Finally, and at a minimum, your Honor, it had the obligation to test that. It can't come to court and say, well, it wasn't made in good faith. It did nothing to test that offer. And, your Honor, having done this for a long time, and I'm sure your Honor having been on the bench for a long time knows, that it is an extraordinary thing for a defendant who resides in a country from which he or she cannot be extradited to in fact voluntarily come to the United States. And so at a minimum if the government was serious about pursuing this case, it had been an obligation to test that offer.

Finally, your Honor, with respect to the government's assertion that as soon as it became clear that there had been

publicity, they move to unseal. I think that that was verbatim what the prosecutor said earlier. That is simply not the case, your Honor. Your Honor, Mr. Ruegg was arrested on August 16 of 2021. That arrest was publicized the very next day, August 17. It appeared in the press. We cite to the link to where the article appears. The government did not move to unseal the indictment for 41 days. So it cannot come here and say, well, as soon as there was publicity, we unsealed it. They did not do that.

MR. ALBERT: Your Honor, I'll be very brief.

THE COURT: Thank you.

MR. ALBERT: With regard to -- counsel alleged that there's domestic activity, the American taxpayers filing false tax returns. That's outside the focus of the *Klein* conspiracy. And the notion that because they could file an indictment that just tracks the statutory language if they file, as they did here, a 35-pager, that defines in much more detail what this conspiracy, that we have to ignore that and give them the benefit of, as if it were a completely blank slate. It's just not the law of this Circuit. It is unusual to dismiss an indictment. But if the indictment by its language and what it says pleads them into a box that they hadn't thought of, the Court doesn't have to close its eyes to that, and that is what has happened here with the extraterritoriality.

With regard to the Zarrab case. In that case, the

language in the opinion in that case does not even speak about *RJR* at all, and it doesn't cite *Bowman*. I don't think that's one that this Court should rely upon. The last point I want to make is just picking up on something your Honor said. I do think it's appropriate and fair not to put our client through a case on a highly problematic doctrine, the *Klein* doctrine if the government, as it did in Ciminelli -- your Honor is 100 right -- in Ciminelli the Solicitor General backed away from the right to control theory. And did so in its papers for the first time ever after dozens and dozens of defendants in this courthouse and in this Circuit in particular were put through that.

I think it's appropriate when your Honor said -- because counsel didn't answer it. Has the Solicitor General said that they're going to stand behind *Klein*, and I think it's appropriate for your Honor to require the government to get that representation from the Solicitor General. And if not, we can all go home. Thank you.

THE COURT: Very good. So, counsel, I'm going to step down to consider the parties' arguments. Thank you very much for your thoughtful comments.

Yes, counsel.

MS. DAVIS: Your Honor, could I just interject and just point the Court to paragraph 19 of the indictment. Mr. Albert got up and said that all the conduct was outside of

the U.S., and that is simply not true as alleged in the indictment. A paragraph that they've ignored repeatedly in their papers and at the podium that they used a U.S. based investment company to liquidate illiquid shares of client-1's holdings at IHAG which was a conditional precedent to them being able to effectuate the Singapore Solution. So if the Court is looking for domestic touch, if you will, of this scheme, it need look no further than paragraph 19, a paragraph that the defendants apparently have not read.

MR. ALBERT: Your Honor, respectfully, we do address that in our papers. I didn't address it today. There's a lot I didn't address today. That is the Craven Watchdog right there. There's something that touched the United States. There's always something that touches the United States. That is incidental. It's not the focus. It is not the focus of the indictment.

THE COURT: Thank you. Understood.

So I'm going to step down now. I'm going to consider the parties arguments. I'll be back out after I've had the opportunity to do that. You should feel free to step out of the courtroom. I don't think that I'll be back in less than ten minutes, so feel free to step out and stretch your legs. I'll be back shortly. Thank you.

(Recess)

THE COURT: You can be seated.

First, thank you very much, counsel, for your arguments. I've considered them. I think I have a view regarding these issues, and I'm going to take sometime now, with apologies, to try to resolve the issues presented by the motion. So please bear with me as I let you know both the outcome of the motion and the reasoning that underpins my decision.

As the parties know, this motion was filed on October 7, 2022. The motion was to dismiss the indictment against him under 18 U.S.C. § 371 for a conspiracy to defraud the United States. Mr. Walchli argues that the indictment is barred by the relevant statute of limitations, or that in the alternative, the indictment must be dismissed because it has improperly been given extraterritorial application. If the Court declines to dismiss the indictment, Mr. Walchli alternatively requests that the Court order the Government to produce—on a timely basis, as early as five months before trial—a Bill of Particulars, a witness list, an exhibit list, and *Jencks* Act and impeachment material.

I have reviewed the parties' submissions. Mr. Wälchli's memorandum in support of his motion was filed on October 7, 2022, and is located at Docket Number 45. I will refer to that document as the "Defendant's Motion." The government's opposition to Mr. Wälchli's motion was filed on October 28, 2022, and is located at Docket Number 47. I will

refer to that document as the "Government's Opposition." Finally, Mr. Wälchli's reply brief was filed on November 11, 2022, and is located at Docket Number 52. I will refer to that document as the "Reply." Finally, I have also listened to and considered oral argument presented by the parties today.

I will rule on this motion orally. For the reasons that follow, defendant's motion to dismiss the indictment is denied. The parties are familiar with the underlying facts and procedural history. Therefore, I will not recite those in detail. To the extent that any of the facts alleged in the indictment are pertinent to my decision, those facts are embedded in my analysis, the same is true with respect to facts presented in the various affidavits submitted by the parties.

I'll begin with I., Legal Standards.

A. Motion to Dismiss an Indictment.

On a pretrial motion to dismiss an indictment, "the allegations of the indictment must be taken as true." *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 343 n.16 (1952). Taking those allegations as true, "at this stage of the proceedings, the indictment must be tested by its sufficiency to charge an offense." *United States v. Sampson*, 371 U.S. 75, 78-79 (1962). In other words, unless the indictment is not "valid on its face," there "is enough to call for trial of the charge on the merits." *Costello v. United States*, 350 U.S. 359, 363 (1956).

Given these rules, "the standard for the sufficiency of an indictment is not demanding." *United States v. Balde*, 943 F.3d 73, 89 (2d Cir. 2019). And indictments are rarely dismissed: "The dismissal of an indictment is an extraordinary remedy reserved only for extremely limited circumstances implicating fundamental rights." *United States v. De La Pava*, 268 F.3d 157, 165 (2d Cir. 2001) (internal citation omitted).

B. Statute of Limitations

The applicable statute of limitations for a conspiracy to defraud the United States in violation of Title 18 U.S.C. § 371 is six years. See 26 U.S.C. § 6531. "The statute of limitations . . . runs from the last overt act during the existence of the conspiracy." *Fiswick v. United States*, 329 U.S. 211, 216 (1946). Further, "the law [is] clear that the filing of a sealed indictment within the statutory period serves to toll the statute of limitations even if the indictment is not unsealed until after the period has expired." *United States v. Watson*, 599 F.2d 1149, 1154 (2d Cir. 1979), opinion amended on reh'g, 690 F.2d 15 (2d Cir. 1979), and modified on reh'g sub nom. *United States v. Muse*, 633 F.2d 1041 (2d Cir. 1980).

Under Federal Rule of Criminal Procedure 6(e)(4), there are no "specific procedures to be followed by the magistrate prior to the sealing of an indictment"–indeed, there is "no need for the United States Attorney to do more in the

first instance than to make a request that the indictment be sealed." *United States v. Srulowitz*, 819 F.2d 37, 41 (2d Cir. 1987). But a criminal defendant has the "right to challenge the propriety of the sealing . . . after the indictment is opened to public inspection." Id. at 41 (emphasis omitted).

Specifically, a criminal defendant may allege, after the indictment is unsealed, that the government did not meet its responsibility to "unseal the indictment as soon as its legitimate need for delay has been satisfied." Watson, 599 F.2d at 1154. "[T]he government, if challenged, must demonstrate legitimate prosecutorial purposes for the secrecy of the indictment." *Srulowitz*, 819 F.2d at 41. The Second Circuit has "held that there are various legitimate prosecutorial objections, including, but not limited to, the facilitation of arrest, that will justify the sealing of an indictment." Id. at 40. An additional legitimate objective, where a given defendant's "confederates [are] indicted defendants as well," is the "need to capture [those defendants]." *Muse*, 633 F.2d at 1041.

Finally, "[i]t is an open question in this Circuit whether a defendant is required to prove actual prejudice to prevail on a statute of limitations motion when the Government has unreasonably delayed the unsealing, or whether prejudice is simply presumed and the indictment should be dismissed." *United States v. Gigante*, 436 F. Supp. 2d 647, 655 (S.D.N.Y.

2006). But if a defendant "can show substantial actual prejudice" from the delay in unsealing an indictment, the Government must show that its decision to delay unsealing was "justified by a strong prosecutorial interest, not simply by a legitimate interest." *Watson*, 599 F.3d at 1149.

C. Extraterritoriality

As a general rule, "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 255 (2010) (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)). And the Supreme Court has articulated a two-step test that is typically employed to determine when a statute applies extraterritorially. First, a court must determine "whether the statute gives a clear, affirmative indication that it applies extraterritorially." *RJR Nabisco, Inc. v. European Cmty.*, 579 U.S. 325, 337 (2016). If not, the Court must then "determine whether the case involves a domestic application of the statute." Id.

But in *United States v. Bowman*, the Supreme Court distinguished between "crimes against private individuals or their property," for which Congress must expressly provide in the statute for extraterritorial application, and "criminal statutes which are, as a class . . . enacted because of the right of the government to defend itself," for which

extraterritorial application can "be inferred from the nature of the offense." 260 U.S. 94, 98 (1922). The Second Circuit has thus explained that there is an exception to the presumption against extraterritoriality for "statutes prohibiting crimes against the United States government," which "may be applied extraterritorially even in the absence of clear evidence that Congress so intended." *United States v. Vilar*, 729 F.3d 62, 73 (2d Cir. 2013) (quoting *United States v. Gatlin*, 216 F.3d 207, 211 n.5. (2d Cir. 2000)).

Let me read another quote from *United States v. Vilar* where the Circuit wrote the following "In other words, the presumption against extraterritoriality does apply to criminal statutes, except in situations where the law at issue is aimed at protecting "the right of the government to protect itself." That is citing to *Bowman*, and it is in *United States v. Vilar* 729 F.3d 73.

II. Analysis.

A. The Indictment is not barred by the statute of limitations

Mr. Walchli argues that the government's indictment must be dismissed pursuant to the statute of limitations. But because the Government had a legitimate prosecutorial purpose to maintain the indictment under seal until it was unsealed on September 28, 2021, the statute of limitations was tolled until that time, and therefore was not exceeded.

The parties agree on several predicate facts concerning this issue. To start, they agree that the statute of limitations for the crime charged against Mr. Wälchli-a so-called "*Klein* conspiracy" under 18 U.S.C. § 371-is six years. See defendant's motion at 8, government's opposition at 3; see also 26 U.S.C. § 6531(1) (setting a six-year statute of limitations for "offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any matter"). The parties further agree that, based on certain aspects of how the statute runs and on acts taken by the Government to toll the statute independent of sealing the indictment, the statute of limitations to bring the indictment ran through April 16, 2021. See Defendant's Motion at 8-9, Government's Opposition at 3-4.

Finally, Mr. Walchli does not contest that the sealed indictment was returned within that timeframe, that it was properly sealed when it was filed, or that the filing of a sealed indictment further tolls the applicable statute of limitations. See Defendant's Motion at 5 (noting that the indictment was returned by the grand jury on September 15, 2020); id. at 11 ("[W]e do not challenge the initial sealing of the Indictment."); id. at 9 ("The law [is] clear that the filing of a sealed indictment within the statutory period serves to toll the statute of limitations even if the indictment is not unsealed until after the period has expired."

(quoting *Watson*, 599 F.2d at 1154)).

Instead, Defendant argues that the Government's failure to unseal the indictment "as soon as its legitimate need for delay [was] satisfied," *Watson*, 599 F.2d at 1154, means that it cannot rely on the sealed indictment to toll the limitations period through September 28, 2021, when the indictment was unsealed after the publication of the arrest of Mr. Wälchli's co-defendant Mr. Ruegg. Defendant points to two events that, in his view, independently required the indictment's unsealing before September 2021.

First, in a telephone call and subsequent letter in October 2020, Mr. Walchli shared that he was willing to come to the United States to contest charges against him; according to Mr. Walchli, after that time, the government could no longer "rely on its desire to facilitate his arrest to support sealing." Defendant's Motion at 12. Second, according to Mr. Walchli, the February 2021 arrest of Mr. Wälchli's co-conspirator Mr. Lampert meant that the other defendants in the case would have learned about it, and that "any claim by the government that the arrest of one defendant 'would cause his co-defendants to flee' could no longer hold water." Id. at 15 (quoting *Muse*, 633 F.2d at 1044).

The Government's decision not to unseal the indictment before September 2021, however, was justified at all times by, at the least, the need to capture Mr. Wälchli's co-defendants.

If the continued sealing of an indictment is challenged by a Defendant, the Government's burden is to "demonstrate legitimate prosecutorial purposes for the secrecy of the indictment." *Srulowitz*, 819 F.2d at 41. The Government has met that burden here.

To start, the Government has a strong argument that Mr. Wälchli's willingness to face charges as soon as October 2020 was not a firm offer but rather a conditional one. See Government's Opposition at 8-9. As the Government notes, while Mr. Walchli offered to appear in the United States at that time, he did so "subject to . . . reaching an agreement on a reasonable bail package." Docket Number 46 Exhibit B. The defense today acknowledged, consistent with its filing, that it would accept only a reasonable deal-not any deal presented by the Government. Because the defendant conditioned his willingness to appear on the agreement on terms that he found to be reasonable, I think that the Government fairly describes this as a conditional offer. It is hard to understand how that conditional offer represented such a firm commitment that it could require immediate unsealing of the indictment by the Government.

But even had Mr. Walchli made a definite offer to appear at that time, it would have done nothing to obviate the Government's legitimate interest in pursuing arrests of Mr. Wälchli's co-conspirators, which unsealing the indictment

could have threatened. Muse is instructive. There, the Government delayed both in unsealing an indictment against and in arresting Defendant Muse, one of four individuals indicted in a narcotics conspiracy, for fear that "the [unsealed] indictment and arrest of Muse would cause his co-defendants to flee." *Muse*, 633 F.2d at 1041. If *Muse* "had been the sole defendant," the Second Circuit explained, "the Government might be hard put to justify its delay" in unsealing the indictment and arresting Muse. Id. "But his confederates were indicted defendants as well, and the need to capture them [was] as justifiable a basis for delay as the need to capture *Muse* himself." Id.

So too here. At the time of Mr. Wälchli's conditional offer to come to the United States to defend charges against him in October 2020, the Government was in the midst of substantial efforts to arrest not only Mr. Walchli but also the other five individual defendants named in the indictment. It had obtained Interpol Red Notices to place arrest warrants into international law enforcement databases; because of a backlog at Interpol, however, those arrest warrants had not yet been published. Government's Opposition at 2. And it knew that all six defendants lived in countries that would not extradite them to the United States. Id. at 7-8.

Accordingly, to arrest any defendant, the Government had to wait for that individual to travel outside of his home

country. Id. Had the Government unsealed the indictment in October 2020, however, it would have risked tipping off all of the defendants before the summer 2021 travel season, which could have, in turn, led them to decline to travel out of their home countries (and prevented the arrest of any of them).

Instead, with the indictment sealed, two of those individuals–Mr. Lampert and Mr. Rüegg–indeed left their home countries and were arrested in other jurisdictions, which provides evidence of the effectiveness of the Government's decision to maintain the seal on the indictment.

Nor did the event undergirding Defendant's second unsealing argument–the arrest of Mr. Lampert in February 2021–eliminate the Government's need to maintain the indictment's seal to avoid informing the other co-defendants about it. Defendant argues that, even though Mr. Lampert's arrest was not reported in the press, given the "close-knit Zurich financial community," the "notion that the other defendants . . . would not learn of his arrest was fanciful." Defendant's Motion at 16. And Defendant's counsel has attested that he did in fact learn of Mr. Lampert's arrest in early February 2021. See Reply at 6 n.4. But Defendant does not assert that the other co-defendants were aware of Mr. Lampert's arrest. Nor does he claim that those defendants (or, for that matter, Mr. Walchli) knew of the content of Mr. Lampert's indictment, as opposed to his arrest; thus, he does not assert

that any of those defendants would have known that they were co-conspirators in the charged Klein conspiracy.

In fact, as defendant admits, there was a limited unsealing order entered in Mr. Lampert's case precluding Mr. Lampert or his defense team from "providing, disseminating, or otherwise revealing the Indictment of the existence or any contents thereof to any person, entity, or third party, by any means." Defendant's Motion at 16 (alterations in original). And as Defendant concedes, "a defendant who knows that he is named in an indictment may be marginally less willing to travel to a jurisdiction where he would be subject to extradition than a defendant who is merely generally aware of a government investigation." Reply at 8 (emphasis omitted).

Defendant notes that the order preventing discussion of the indictment in Mr. Lampert's case was not entered until nineteen days after his arrest, and that discussions between Mr. Lampert and the other defendants about the indictment could have occurred in that window. Id. But crediting that argument-that the arrest of one co-defendant requires the unsealing of a criminal indictment as to all, even if there is no evidence that the Government knew of conversations about the indictment between the co-conspirators-would be very problematic as a rule.

In cases involving a sealed indictment against multiple co-conspirators, after all, the defendants will often

be in tight-knit communities like the defendants here; if that fact precluded the Government from arresting one individual and maintaining a sealed indictment as to the others, it would be extremely difficult for the Government to pursue conspiracy cases. Ad lib about drug cases Here, given that Defendant has not shown that discussions between charged co-conspirators about the indictment's content actually occurred, much less that the Government knew of any such discussions, he has not shown that the Government's belief that the indictment's unsealing could reveal its existence to other defendants was illogical or unreasonable. To the contrary, the arrest of Mr. Ruegg in August 2021, even after Mr. Lampert's February 2021 arrest, strongly supports the Government's view of the need to maintain the indictment's seal after Mr. Lampert's arrest. See Government's Opposition at 13.

Had Mr. Ruegg known he was named in the indictment despite its sealing, it is extremely unlikely, or at least somewhat less likely, he would have traveled to a country where he could be arrested; that he did so significantly undercuts the defense's argument that Mr. Wälchli's co-conspirators knew about the indictment's contents after Mr. Lampert's arrest. In short, the arrest of Mr. Lampert in February 2021 does not mean that the other defendants in this case knew about the indictment's content, and the Government accordingly had legitimate reason to maintain it under seal after that arrest.

Defendant's cited cases are unavailing. His lead case, *United States v. Gigante*, 436 F. Supp. 2d 647 (S.D.N.Y. 2006), involved an indictment against a single defendant where the Government obtained four superseding sealed indictments, all to extend the statute of limitations and effectuate "the Government's need for additional time to investigate a related and still uncharged crime." 436 F. Supp. 2d at 650-51, 653. The court rejected that rationale for sealing. Id. at 658. And while it noted that "the facilitation of arrest" is a motive that can justify continued sealing of an indictment, id. at 654 (quoting *Srulowitz*, 819 F. 2d at 40), it held that on the case's facts, sealing the indictment was not necessary to pursue Mr. *Gigante's* arrest, see id. at 657.

By contrast, the Government here had good reason to think that continuing the seal of the indictment was necessary, or at least helpful, to achieving the arrests of other defendants in this case. As discussed, that reasoning was borne out when, even after the arrest of Mr. Lampert, the indictment remained sealed and Mr. Ruegg traveled out of his home country, enabling his arrest. See Government's Opposition at 13. More broadly, Defendant does not cite to any case in which a court rejected as illegitimate the Government's decision to maintain a sealed indictment in order to effectuate the arrest of co-defendants. This Court declines to be, to its knowledge, the first court to do so.

Defendant's final response is to suggest other paths the government could have taken in pursuing the arrests of Mr. Wälchli's co-defendants. See Reply at 8 (noting that the Government "could have (1) applied for a limited unsealing order with respect to Mr. Walchli, as it did with Mr. Lampert following his arrest in February 2021; (2) obtained a bare-bones superseding indictment charging Mr. Walchli alone, as it has done in several other cases in this District; or (3) charged Mr. Walchli in a separate, sealed criminal case"). But charging decisions are within "the "broad discretion of the prosecutor, . . . and a prosecutor's pretrial charging decision is presumed legitimate." *United States v. Sanders*, 211 F.3d 711, 716 (2d Cir. 2000). Unless Mr. Walchli can show significant prejudice from the continued sealing of the indictment, the Government's burden is not to show that it had no other paths to pursue its stated pretrial goals; rather, it must merely show some "legitimate prosecutorial purpose[ ] for the secrecy of the indictment." *Srulowitz*, 819 F.2d at 41; see also *Watson*, 599 F.2d at 1154 (requiring only that the Government show some "legitimate need for delay" in unsealing the indictment to maintain the seal but noting that "when a defendant can show substantial actual prejudice, the Government must show that the delay is justified by a strong prosecutorial interest, not simply by a legitimate interest").

Here, Mr. Walchli challenges, at most, less than a

year of continued sealing from October 2020 (when he made his conditional offer to appear in the U.S.) to September 2021, when the indictment was unsealed. And he does not make any specific argument about prejudice that he suffered because of the continued sealing of the indictment. So the Government's burden is merely to show a legitimate prosecutorial purpose for the continued sealing, *Srulowitz*, 891 F.2d at 41, and under Muse, there is no doubt that the need to avoid tipping off Mr. Wälchli's co-defendants was such a purpose. Accordingly, the Government's sealing of the indictment until September 2021 was not unlawful, it was reasonable; the statute of limitations on Mr. Wälchli's indictment did not expire before then, and the indictment will not be dismissed on that basis.

B. Section 371 Applies Extraterritorially

Mr. Wälchli's second argument for dismissing the Government's indictment is that it relies on an invalid extraterritorial application of the *Klein* doctrine. But because, in the Court's view, 18 U.S.C. § 371 does under Second Circuit law apply extraterritorially, the indictment will not be dismissed for this reason either.

This issue turns on what standard applies to determine extraterritoriality. Defendant urges the Court to apply the two-step framework laid out in several Supreme Court cases, most recently *RJR Nabisco, Inc. v. European Community*, 579 U.S. 325 (2016). Under that framework, the Court must first decide

"whether the statute gives a clear, affirmative indication that it applies extraterritorially." Id. at 337. If not, then the statute may only be applied if there was "a domestic application of the statute." Id. This framework operates and is sometimes referred to as a "presumption against extraterritoriality." See Reply at 12.

The Government in its briefing, however, disputes that the RJR Nabisco framework and the presumption against extraterritoriality apply here. It points to longstanding Second Circuit and Supreme Court precedent that "[s]tatutes prohibiting crimes against the United States government may be applied extraterritorially even in the absence of clear evidence that Congress so intended." *Vilar*, 729 F.3d at 73 (2d Cir. 2013) (quoting *Gatlin*, 216 F.3d at 211 n.5); see Bowman, 260 U.S. at 98 (distinguishing "[c]rimes against private individuals or their property," for which Congress must expressly provide in the statute for extraterritorial application, from "criminal statutes which are, as a class . . . enacted because of the right of the government to defend itself," for which extraterritorial application can "be inferred from the nature of the offense").

It notes that this exception to the presumption against extraterritoriality applies to prosecutions against foreign nationals as well as to those against U.S. citizens. Government's Opposition at 19 n.6; see, e.g., *United States v.*

Siddiqui, 699 F.3d 690, 698, 700-01 (2d Cir. 2011). In argument, the Government has stepped back from its reliance on *Siddiqui*. And it argues that no Supreme Court case, including *RJR Nabisco*, can be read to have altered that exception.

In the Court's view, the Government has the stronger argument. Importantly, both the Second Circuit and Supreme Court have indicated that unless binding precedent is directly overruled, courts must apply it. For instance, the Second Circuit has noted that it reads its own cases "in harmony with [the Circuit's] other precedents." *United States v. Punn*, 737 F.3d 1, 12 (2d Cir. 2013).

And the Supreme Court has instructed courts of appeal that "if a precedent of this Court directly has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriquez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989). While those cases addressed how appellate courts should read arguably conflicting precedents, they stand for the broader principle that courts should not discard binding precedent unless it has been clearly overruled.

Applied here, that principle dictates that the standard articulated by the Supreme Court in Bowman and reaffirmed by the Second Circuit in *Vilar* and elsewhere-that

statutes that "relate to crimes against the United State government" apply extraterritorially, 729 F.3d at 73–remains binding on this Court. Defendant's attack on the relevant language in *Vilar* as dicta that has "plainly not survived the day," Reply at 15, is inaccurate. Contrary to Defendant's contention, there is simply no "plain" indication that the *Bowman, Vilar,* and similar cases have been reversed. While the Supreme Court has used broad language in recent years to describe the presumption against extraterritorially, it has not discussed, let alone overruled, *Bowman* or the exception to the presumption that it created for crimes against the U.S. government.

And the Second Circuit decisions that have, since *RJR Nabisco*, applied the presumption against extraterritoriality in criminal cases have done so with respect to statutes that regulate crimes against individuals, rather than those against the United States. See *United States v. Napout*, 963 F.3d 163, 168 (2d Cir. 2020) (conspiracy to commit honest services wire fraud); *United States v. Hoskins*, 902 F.3d 69, 72 (2d Cir. 2018) (bribery of foreign officials under the Foreign Corrupt Practices Act); *United States v. Epskamp*, 832 F.3d 154, 160 (2d Cir. 2016) (intent to distribute a controlled substance aboard an aircraft). In short, absent clear overruling of Bowman, or for my purposes, significantly, *Vilar*, or other decisions discussing and applying the exception to the presumption

against extraterritoriality for crimes against the government, this Court cannot discard those decisions.

Vilar's timing, in particular, is strong evidence of the continued validity in this circuit of the exception to the presumption of extraterritoriality for crimes against the government, given that *Vilar* articulated that exception even after several Supreme Court cases used broad language to describe the presumption's scope. In *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), for instance, the Supreme Court explicitly stated that courts "apply the presumption in all cases." 561 U.S. at 261. And in *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013), the Court again described the presumption against extraterritoriality as applying to statutes generally. See 569 U.S. at 115.

Yet even after these two decisions, *Vilar* reaffirmed that the presumption does not apply to "situations where the law at issue is aimed at protecting 'the right of the government to defend itself.'" 729 F.3d at 73 (quoting *Bowman*, 260 U.S. 94, 98 (1922)). So Defendant's view that *RJR Nabisco* changed all of that by noting that the presumption applies to "federal laws," without further consideration of what exceptions might apply, is hard to square with the Second Circuit's re-articulation, in *Vilar*, of presumed extraterritorial application of laws that prevent crimes against the U.S. Government even post-Morrison and *Kiobel*.

I am not writing on a blank slate. While as a district court judge, I might have missed the import of the language in Morrison, I expect that the Second Circuit would not have fallen so short when reaching their conclusion in *Vilar*: I assume that the Circuit fully appreciated the ruling in Morrison and considered it in reaching the conclusion that they did in *Vilar*. If *Vilar* was wrongly decided, it is for the Second Circuit, not me, to decide. Similarly, if they want to walk back the sweep of the statements that they made in *Vilar*, that is for them to do.

This conclusion also accords with the one reached by the only court (to this Court's knowledge) in this circuit to consider the extraterritorial application of 18 U.S.C. § 371 after *RJR Nabisco*. See *United States v. Buck*, No. 13-cr-0282, 2017 WL 4174931 (S.D.N.Y. Aug. 28, 2017). In *Buck*, Judge Marrero concluded that "as warranted by *Vilar*, Section 371 may be applied extraterritorially," and that he was "not convinced that *Kiobel*, *Morrison*, or *RJR Nabisco* compel a different result." 2017 WL 4174931, at *7.

Judge Marrero noted that those three civil Supreme Court cases are "are silent with respect to the application of extraterritoriality in the context of criminal prosecution." Id. And he ended his discussion of the issue by "find[ing] that *Kiobel*, *Morrison*, and *RJR Nabisco* have no bearing on criminal actions brought by the United States Government to

prosecute criminal offenses committed abroad that defraud the United States." Id.

This Court believes that based on the nature of existing Second Circuit precedent, it must agree. Because that is so, the government's extraterritorial application of 18 U.S.C. § 371 to defendant's conduct was not improper. There is no question that this statute, and the Klein doctrine under which Mr. Walchli is being prosecuted, represent crimes committed against the United States rather than against individuals. See 18 U.S.C. § 371 (criminalizing conspiracies "to defraud the United States, or any agency thereof in any manner or for any purpose"); *United States v. Klein*, 247 F.2d 908, 916 (2d Cir. 1957) (interpreting 18 U.S.C. § 371 to prohibit not only "the cheating of the Government out of property or money," but also "interfering with or obstructing one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest" (internal citation omitted)).

Indeed, defendant makes no argument that, if *Bowman* and *Vilar* govern this case, the extraterritorial application of the statute to Mr. Walchli was unlawful. Accordingly, the Court declines to dismiss the indictment as an improper extraterritorial application of 18 U.S.C. § 371.

Ad lib about Government's argument.

Finally, the Court recognizes that the Defendant has

raised a facial challenge to the *Klein* doctrine for preservation for the Second Circuit, even while acknowledging that, in light of binding precedent, "this Court cannot sustain such a facial challenge to Klein." Defendant's Motion at 18. That is correct–this Court is bound by the Second Circuit to recognize the continued validity of *Klein*. Nonetheless, the Court notes that Defendant has raised strong arguments that Klein, in criminalizing dishonest conduct that does not actually deprive the government of any property, appears discordant both with the plain text of 18 U.S.C. § 371 and recent guidance from the Supreme Court concerning the reading of criminal statutes. See 18 U.S.C. § 371 (prohibiting conspiring to "defraud the United States"); *McNally v. United States*, 483 U.S. 350, 358 (1987) (noting that "'to defraud' commonly refer[s] 'to wronging one in his property rights by dishonest methods or schemes'" (quoting *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924)); *Kelly v. United States*, 140 S. Ct. 1565, 1571–72 (2020) (similarly limiting a statute focused on wire fraud to the deprivation to "only when" the fraudulent scheme is "for obtaining money or property" (internal citation omitted)); see also *Wooden v. United States*, 142 S. Ct. 1063, 1082–87 (2022) (*Gorsuch, J.*, concurring) (calling for a reinvigoration of the "rule of lenity").

Defendant's argument on this point is thus well-taken–but, given binding Second Circuit precedent, does

not permit dismissal here. I asked the government whether they had consulted with the Solicitor General's office to confirm that it will support any conviction obtained in this case in the Second Circuit and the Supreme Court. I'm not going to order that they do so, but I will definitely reiterate a logical comment made by defendants counsel which is that it would be useful perhaps to do so given in particular that this case rests exclusively on that statute.

So again, I'm not ordering that the government do anything. But given what we know the defendant's view regarding this statute and we know what the next steps would be in this case should there be a conviction, it might make sense to consider soliciting feedback on the continued viability of the doctrine and the Solicitor General's willingness to support the viability of the doctrine here.

III. Defendant's Alternative Requests for Pretrial Materials.

Because the indictment is not dismissed, I now turn to considering Defendant's alternative requests. I am going to begin by discussing the legal standards for these requests, and then expect to engage in a discussion with the parties to help guide my resolution of these issues.

A. Legal Standards

i.Defendant's Demand for Production of a Bill of Particulars

Federal Rule of Criminal Procedure 7(f) "permits a defendant to seek a bill of particulars in order to identify with sufficient particularity the nature of the charge pending against him, thereby enabling defendant to prepare for trial, to prevent surprise, and to interpose a plea of double jeopardy should he be prosecuted a second time for the same offense." *United States v. Bortnovsky*, 820 F.2d 572, 574 (2d Cir. 1987). The decision to grant or deny a request for a bill of particulars "rests within the sound discretion of the district court." Id. Requests for "whens," "wheres," and "with whoms" regarding conspiracy are routinely denied. *United States v. Mitlof*, 165 F. Supp. 2d 558, 569 (S.D.N.Y. 2001).

"A bill of particulars is required 'only where the charges of the indictment are so general that they do not advise the defendant of the specific acts of which he is accused.'" *United States v. Walsh*, 194 F.3d 37, 47 (2d Cir. 1999) (internal citations omitted). It is not "a general investigative tool, a discovery device or a means to compel the government to disclose evidence or witnesses to be offered prior to trial." *United States v. Tuzman*, No. 15-cr-536, 2017 WL 4785459, at *13 (S.D.N.Y. Oct. 19, 2017) (quoting *United States v. Gibson*, 175 F.Supp. 2d 532, 537 (S.D.N.Y. 2001)). "Instead, its purpose is to supplement the facts contained in the indictment when necessary to enable defendants to identify with sufficient particularity the nature of the charges against

them." Id. (quoting *United States v. Gotti*, No. 02-cr-743, 2004 WL 32858, at *8 (S.D.N.Y. Jan. 6, 2004)). "The line between mere evidentiary detail and information needed to prepare a defense and prevent unfair surprise can be thin indeed." *Rajaratnam*, 2010 WL 2788168, at *1.

It is well-established that a defendant is entitled to a bill of particulars only where it is "'necessary to the preparation of his defense, and to avoid prejudicial surprise at the trial.'" *United States v. Torres*, 901 F.2d 205, 234 (2d Cir. 1990), abrogated on other grounds by *United States v. Marcus*, 628 F.3d 36, 41 (2d Cir. 2010)) (quoting 1C. *Wright*, Federal Practice and Procedure § 129, at 434-35 (2d ed. 1982)). "[A] bill of particulars is not necessary where the government has made sufficient disclosures concerning its evidence and witnesses by other means." *Walsh*, 194 F.3d at 47. However, the Government cannot "fulfill its obligation merely by providing mountains of documents to defense counsel who were left unguided as to which documents [the Government would rely on at trial]." *Bortnovsky*, 820 F.2d at 575.

In "evaluating requests for disclosure of the identity of unindicted co-conspirators, courts should consider such factors as: (i) the number of co-conspirators; (ii) the duration and breadth of the alleged conspiracy; (iii) whether the Government otherwise has provided adequate notice of the particulars; (iv) the volume of pretrial discovery; (v) the

potential danger to co-conspirators and the nature of the alleged criminal conduct; and (vi) the potential harm to the Government investigation." United States v. Joseph, No. 02-cr-1589, 2003 WL 22019427, at *2 (quoting United States v. Nachamie, 91 F. Supp. 2d 565, 572 (S.D.N.Y. 2000)).

ii. Defendant's Demand for Production of a Witness List, 18 U.S.C. § 3500 Material, Impeachment Material, and Exhibits.

There is no constitutional requirement "that the prosecution must reveal before trial the names of all witnesses." *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). Nor does Federal Rule of Criminal Procedure 16 "require the Government to furnish the names and addresses of its witnesses." *United States v. Bejasa*, 804 F.2d 137 (2d Cir. 1990). That said, in their discretion, "district courts have the authority to compel pretrial disclosure of the identity of government witnesses." *United States v. Cannone*, 528 F.2d 296, 300 (2d Cir. 1975).

But if the defense makes "only an abstract, conclusory claim that such disclosure was necessary to its proper preparation for trial" and the "government advance[s] specific grounds for denying the defense's requests for discovery of the identity of the government's witnesses," it is an abuse of discretion to require production of the identity of government witnesses. Id. at 301-02.

In contrast to the discretion courts retain to require the Government to produce witness lists, the "*Jencks Act* prohibits a District Court from ordering the pretrial disclosure of witness statements." *United States v. Coppa*, 267 F.3d 132, 145 (2d Cir. 2001); see 18 U.S.C. § 3500(a) (the *Jencks Act*, which provides that no witness statement shall be discoverable "until said witness has testified on direct examination on trial of the case").

Even so, the Second Circuit has noted that in the "spirit of cooperation among court and counsel," it is appropriate for courts to encourage pretrial disclosure of such materials where possible. *United States v. Percevault*, 490 F.2d 126, 132 (2d Cir. 1974).

Additionally, although it is not required by Rule 16, "it is within a district court's authority to direct the Government to identify [prior to trial] the documents it intends to rely on in its case in chief." *United States v. Vilar*, 530 F. Supp. 2d 616, 639 (S.D.N.Y. 2008) (collecting cases). Disclosure of an exhibit list prior to trial has been ordered in cases involving a large volume of documents and a complex alleged scheme. See, e.g., *Vilar*, 530 F. Supp. 2d at 639-40 (finding it reasonable, in part because of the large number of documents at issue, to grant request for early disclosure of exhibit list); *United States v. Chalmers*, 474 F. Supp. 2d 555, 573 (S.D.N.Y. 2007) ("In this case, given the

large volume of documents produced by the Government thus far, a significant portion of which are in Arabic and have yet to be translated by the Government . . . defendants' requests for pre-trial disclosure are reasonable."); *United States v. Falkowitz*, 214 F. Supp. 2d 365, 392-93 (S.D.N.Y. 2002) ("Although the requested discovery is not specifically authorized, the Court finds that Defendants' request is reasonable because of the numerous documents and alleged participants in the relatively complex Scheme.").

Finally, "the Second Circuit requires only that impeachment material be disclosed 'in time for its effective use at trial.'" *United States v. Canter*, 338 F. Supp. 2d 460, 462 (quoting *United States v. Coppa*, 267 F.3d 132, 142 (2d Cir. 2001)). The baseline practice for courts in this district is to require "that the Government produce these materials a few days before the start of trial, usually on the Friday before a trial scheduled to start on a Monday." Id. (citing *United States v. Santiago*, 174 F.Supp. 2d 16, 40-41 (S.D.N.Y. 2001); *United States v. Perez*, 940 F. Supp. 540, 553 (S.D.N.Y. 1996)).

But adherence with common practice is not the legal standard-the rule remains that the material must be disclosed in time for its effective use at trial. *United States v. Siddiqi*, No. 06-cr-377, 2007 WL 549420, at *4 (S.D.N.Y. Feb. 21, 2007) ("[T]he Court notes that the existence of a long-standing and judicially-endorsed practice in this District

allowing the prosecution to produce [impeachment] evidence the Friday before trial does not absolve the Government of its overriding obligation to provide [impeachment] material in time for its effective use at trial. This standard remains the constitutional benchmark and it must be applied to the distinct facts of each individual case.") (citations omitted).

In short, "where the complexity of the case is exceptional and the amount of evidentiary materials it produces is extremely voluminous," the Court may "order the Government to disclose such materials well in advance of trial." *Canter*, 338 F. Supp. 2d at 462.

B. Analysis

i. Bill of Particulars

The Court concludes that Mr. Walchli is entitled to a bill of particulars identifying unindicted co-conspirators. It is true that requests for "whens," "wheres," and "with whoms" regarding conspiracy are routinely denied. *Mitlof*, 165 F. Supp. 2d at 569. But here, Mr. Walchli seeks only the "with whoms"–his request for a Bill of Particulars is limited to "identifying known, unindicted co-conspirators." Defendant's Motion at 28. Accordingly, the relevant factors for consideration are "(i) the number of co-conspirators; (ii) the duration and breadth of the alleged conspiracy; (iii) whether the Government otherwise has provided adequate notice of the particulars; (iv) the volume of pretrial discovery; (v) the

potential danger to co-conspirators and the nature of the alleged criminal conduct; and (vi) the potential harm to the Government investigation." *Joseph*, 2003 WL 22019427, at *2 (quoting *Nachamie*, 91 F. Supp. 2d 565, 572 (S.D.N.Y. 2000)).

Here, the Indictment alleges that the conspiracy spanned six years and included at least five companies. See Docket Number 2 1-2. Additionally, it repeatedly refers to "others known and unknown" who participated in the alleged conspiracy. See, e.g., id. 8-9, 11. Defendant, moreover, has represented that the Government's admittedly voluminous disclosure materials do not "answer the critical question of which of the hundreds of people named in those documents the government will claim was a co-conspirator." Defendant's Motion at 29.

The Government does not contest this. Nor does it claim that disclosing known, unidentified co-conspirators would cause "potential danger to co-conspirators" or "potential harm to the Government investigation." *Joseph*, 2003 WL 22019427, at *2 (quoting *Nachamie*, 91 F. Supp. 2d at 572). Instead, it critiques Defendant's request as "appear[ing] to be an improper effort to cabin the Government's proof at trial." Government's opposition at 29. But it is hard to see why that is so, given Defendant's representation that if the Government "learns of additional co-conspirators between now and the start of the trial, [it] can amend its bill of particulars to identify those

individuals." Reply at 27 n.22. ad lib about length.

The Government, of course, is correct that "[c]ourts have routinely held that the Government is not required to identify all unindicted co-conspirators." Government's Opposition at 29. But courts have also often held the opposite; that is a natural byproduct of district courts' discretion in reviewing requests for Bills of Particulars and the fact that each case presents distinct facts. See, e.g., *United States v. Akhavan*, 20-cr-188, 2020 WL 2555333, at *2 (S.D.N.Y. May 20, 2020); United States v. Barrett, 153 F. Supp. 3d 552, 572-73 (E.D.N.Y. 2015); United States v. *Kahale*, 789 F. Supp. 2d 359, 372-73 (E.D.N.Y. 2009); *Nachamie*, 915 F. Supp. 2d at 573.

Considering the length of the conspiracy charged, the number of potential co-conspirators, the large volume of discovery, and the apparent lack of potential danger to co-conspirators or to the Government's investigation, granting Defendant's narrow bill of particulars request for a list of known, unidentified co-conspirators is appropriate. See, e.g., *Akhavan*, 2020 WL 2555333, at *2 (granting bill of particulars where the charged conspiracy lasted three years and the volume of discovery made it so that it was "practically impossible for the defendants to ascertain whom the Government considers a co-conspirator"). Knowing the identity of known and identified purported co-conspirators will also likely help the parties and

the Court evaluate the admissibility of out-of-court statements made by those individuals.

I accordingly order that the Government produce a bill of particulars identifying all known co-conspirators no later than fourteen days from the date of this order, and that the Government update that list should any other known co-conspirators arise.

ii. Production of a Witness List, 18 U.S.C. § 3500 Material, Impeachment Material, and Exhibits

I will now turn to the other materials requested by Defendant-his request for early disclosure of witnesses that the Government intends to call in its case-in-chief, witness statements under the *Jencks Act*, 18 U.S.C. § 3500, impeachment material for such witnesses, and an exhibit list and copies of exhibits it intends to call during its case-in-chief.

I anticipate ordering that the government produce all of defendants requested materials, aside from those under the *Jencks* Act four weeks in advance of trial as the government has stated it can do, and will request that the government consider producing material under the *Jencks* Act on that same timeframe.

And I anticipate further ordering and requesting as appropriate, the defense to produce those same materials three weeks in advance of trial.

As previously noted, varying legal standards apply to different aspects of Defendant's request. First, "it is within

a district court's authority to direct the Government to identify [prior to trial] the documents it intends to rely on in its case in chief," *Vilar*, 530 F. Supp. 2d at 639, and disclosure of an exhibit list prior to trial has been ordered in cases involving a large volume of documents and a complex alleged scheme, see, e.g., id. at 639–40.

Second, "the Second Circuit requires . . . that impeachment material be disclosed 'in time for its effective use at trial.'" *Canter*, 338 F. Supp. 2d at 462 (quoting *Coppa*, 267 F.3d at 142). Finally, and contrastingly, the "*Jencks* Act prohibits a District Court from ordering the pretrial disclosure of witness statements." *Coppa*, 267 F.3d at 145.

Defendant requests that this material be disclosed sixty days in advance of Mr. Wälchli's deadline for motions in limine, a time that is approximately five months in advance of trial. Defendant's Motion at 31. But he does not cite any authority for such a remarkably early production of material, nor does he cite any authority for the proposition that the production of this material should be tied to the deadline for motions in limine. See id. at 31–32 (listing cases wherein material was ordered to be produced, at most, eight weeks before trial). Indeed, as far as this Court can tell, ordering the production of these materials five months in advance of trial would be wholly unprecedented.

On the other hand, several facts nonetheless compel

the Court to require the production of the non-Jencks Act material four weeks in advance of trial. First, the defense should be provided adequate time before trial to investigate key witnesses who may reside overseas.

I understand that the government has asserted that they have identified many of those witnesses, which is part of the reason why I conclude that four weeks is sufficient. Second, there are substantial number of documents in this case for defendant to review -- approximately 171,000 pages according to defendant. See defendant's motion at 32.

Given these facts, the Court believes requiring production of this material four weeks before trial is sufficient both to comply with the constitutional requirement that impeachment material be disclosed in time for its effective use at trial, and a reasonable exercise of its discretion to compel early production of exhibits. See Canter, 338 F. Supp. 2d at 462; *Vilar*, 530 F. Supp. 2d at 639 (S.D.N.Y. 2008).

By contrast, the Court cannot order the government to provide early disclosure of materials under the *Jencks Act*, I've told you that the plain command based on the Jencks Act's text which provides that no witness statement shall be discoverable "until said witness has testified on direct examination on trial of the case," precludes the Court from directing the Government to provide *Jencks Act* material at any

specific time in advance of trial.

Nonetheless, as I've said, the Second Circuit has noted that in the "spirit of cooperation among court and counsel," it is appropriate for courts to encourage pretrial disclosure of such materials where possible, so let me do that.

Counsel for the United States, you're willing to commit to producing the *Jencks* Act materials also four weeks in advance of trial?

MS. DAVIS: Yes, your Honor. As a practical matter, we've already produced most of them.

THE COURT: Thank you very much.

To summarize, no later than four weeks before trial, the government is directed to provide defendant with a preliminary, or "working," list of witnesses and exhibits it expects to use at trial, no later than four weeks before trial, unless the government, as to any particular document or witness, demonstrates by convincing evidence that the disclosure may endanger any witness or other person or would otherwise be significantly prejudicial to the orderly presentation of the government's case. See *United States v. Falkowitz*, 214 F. Supp. 2d at 392-93.

The government is further directed to provide Defendant with any impeachment material and with copies of its electronic exhibits by that same time. The Court understands that the Government has committed to providing *Jencks* Act

material by that same date and I appreciate that.

Finally, it should be obvious that the government is obligated to provide the defense with any *Brady* information consistent with its obligations if such materials are included in materials that otherwise *Jencks* Act material, they are not protected from prompt disclosure to the defense. So the government must comply with its obligations under *Brady* and its progeny, and that is just the rule and I remind you of it.

So counsel for the defendants, I'm directing that the defense provide a reciprocal list of its exhibits and witnesses, impeachment materials and copies of exhibits on or about the dates that three weeks before trial, and understand that the defense I hope will commit to providing the equivalent to *Jencks* Act material with respect to your witness by that date.

Are you willing to do that with respect to your witness statements, counsel for defendant?

MR. TEMKIN: Yes, your Honor.

THE COURT: Good. Thank you very much.

I'm not going to set a schedule now for the filing of additional motions *in limine* after these materials are produced. Let me just set my baseline expectation. my baseline expectation is that consistent with normal practice, the parties will file plenary motions *in limine* prior to these disclosures. My expectation is that you will do it with

respect to issues that you are aware of.

If the production of any of these materials prior to trial raises additional issues that may justify the filing of additional motions *in limine*, I'll consider an application for leave to file such additional motions. But you should expect that the default rule will be that you should file motions *in limine* with respect to issues that you anticipate arising at trial; and that you, therefore, will have to do so before the full scope of the government's case has been revealed to you through these disclosures that I will be ordering and gratefully accepting your offer of as appropriate. So thank you very much, counsel.

Thank you to our court reporter for your indulgence. That's all that I wanted to take up. Just a brief note for the government. Your walking away from *Vilar* sort of confounded me here as you can tell, so just a brief note on that. Good.

What else do we need to take up here, if anything? I understand that we've already excluded time through the trial date, so I don't think that that's a piece of business that we need to take up. Is there anything else that we need to take up before we adjourn? First counsel for the government.

MS. DAVIS: Your Honor, I don't believe that the government walked away from *Vilar*. I think what Mr. Magnani was doing was offering a different way to look at *Vilar* given *RJR Nabisco*. We've obviously briefed this. You've heard our

argument. You've ruled. That's fine. We want to make clear that we certainly acknowledge that *Vilar* is binding precedent on this Court.

THE COURT: Thank you. That's fine. Thank you.

We'll leave the needling over this to law professors. If it was earlier in the day, I might take it up.

Counsel for defendants, anything else from you?

MR. ALBERT: Nothing further.

THE COURT: Thank you all very much. This proceeding is adjourned. Thank you very much.

(Adjourned)